Supreme Court, U.S.
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No.

IN THE
**SUPREME COURT OF THE UNITED STATES**

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**TERRY WEST, INDIVIDUALLY AND AS GUARDIAN OF A MINOR, T.W., AND T.W., A MINOR,**
*Petitioners,*

v.

**DERBY UNIFIED SCHOOL DISTRICT NO. 260,**
*Respondent.*

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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June 19, 2000

97pp + Flo's

## QUESTIONS PRESENTED

1. Whether Respondent school district applied its "Racial Harassment or Intimidation" policy against Petitioner T.W. in violation of the First and Fourteenth Amendments to the United States Constitution, based upon Petitioner's possession of a drawing of the Confederate battle flag, and given that Petitioner neither harassed nor intimidated anyone with the drawing, nor intended to do so.

2. Whether Respondent's "Racial Harassment or Intimidation" policy is unconstitutionally overbroad as written, and vague in application, in violation of the First and Fourteenth Amendments to the United States Constitution.

3. Whether Respondent school district denied Petitioner equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution by promulgating a written policy that by its terms banned all student expression regarding the flag, while the school itself displayed the flag in contexts approved by the school.

4. Whether Respondent school district's suspension of Petitioner denied him meaningful due process of law under the Fourteenth Amendment, where Respondent's disciplinary official knew Petitioner lacked the intent to commit the harassment or intimidation the policy was aimed to prevent yet still suspended him for "Racial Harassment/ Intimidation."

## PARTIES TO THE PROCEEDING

Petitioners are Terry West, individually and as guardian of his minor son, T.W., and T.W., a minor, a student in the Derby Unified School District No. 260. Petitioners were plaintiffs in the District of Kansas and appellants in the Tenth Circuit Court of Appeals.

Respondent is the Derby Unified School District No. 260, a public school district organized under the laws of the State of Kansas.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF CITED AUTHORITIES ..... v

TABLE OF APPENDICES ..... vii

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

REASONS FOR GRANTING THE WRIT ..... 7

I. THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE SUPREME COURT'S PRIOR RULINGS, INCLUDING *TINKER V. DES MOINES*, AND DRAMATICALLY CURTAILS STUDENTS' FIRST AMENDMENT RIGHTS. ..... 7

II. WITHOUT THE TENTH CIRCUIT'S LIMITING CONSTRUCTION OF A "LEGITIMATE EDUCATIONAL PURPOSE," THE POLICY IS SUBSTANTIALLY OVERBROAD AS WRITTEN; WITH THE LIMITING CONSTRUCTION, ITS VAGUENESS IS EXACERBATED. ..... 10

III. THE TENTH CIRCUIT ALSO UNDULY CONSTRICTS THE *TINKER* STANDARD IN ITS TREATMENT OF PETITIONERS' EQUAL PROTECTION COUNT, BY UPHOLDING THE SUSPENSION OF T.W. FOR POSSESSION OF A SYMBOL THAT THE PUBLIC SCHOOL ITSELF DISPLAYS IN SCHOOL-APPROVED CONTEXTS . . . . . 12

IV. THE TENTH CIRCUIT MISAPPLIED DUE PROCESS PRINCIPLES BY ALLOWING T.W.'S SUSPENSION FOR "RACIAL HARASSMENT / INTIMIDATION" TO STAND DESPITE THE ADMINISTRATOR'S LACK OF ANY FINDING THAT T.W. DID OR INTENDED TO HARASS OR INTIMIDATE WITH THE SYMBOL . . . . . 14

CONCLUSION . . . . . 17

## TABLE OF CITED AUTHORITIES

**Cases:** **Page:**

*Bell* v. *Burson*, 402 U.S. 535 (1971) . . . . . 16

*Bethel School District No. 404* v. *Fraser*, 478 U.S. 682 (1986) . . . . . 16

*Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973) . . 10, 11

*Cox* v. *Louisiana*, 379 U.S. 536 (1965) . . . . . 14

Goss v. *Lopez*, 419 U.S. 565 (1975) . . . . . 17

*Police Dept. of City of Chicago* v. *Mosley*, 408 U.S. 92 (1972) . . . . . 14

*R.A.V.* v. *City of St. Paul*, 505 S.Ct. 377 (1992) . . . . . 9

*Sioux City Bridge Co.* v. *Dakota Company*, 260 U.S. 441 (1923) . . . . . 12

*Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) . . 7, 8, 9, 10, 11, 15

*Village of Willowbrook v. Olech*, ___ U.S. ___, 120 S.Ct. 1073 (2000) . . . . . 12

*West v. Derby Unified School Dist. #260*, 23 F.Supp.2d 1223 (D. Kan. 1999) . . . . *passim*

*West v. Derby Unified School Dist. #260*, 206 F.3d 1358 (10th Cir. 2000) . . . . . *passim*

*Cited Authorities*

**Statutes:**

28 U.S.C. §§ 1331 . . . . . 2

28 U.S.C. §§ 2201 . . . . . 2

28 U.S.C. §§ 2202 . . . . . 2

42 U.S.C. §§ 1983 . . . . . 2

Federal Rule of Civil Procedure 56 . . . . . 6

**United States Constitution:**

AMENDMENT I . . . . . *passim*

AMENDMENT XIV . . . . . i, 1, 2, 5, 12

**Other Authorities:**

Respondent's Racial Harassment or Intimidation Policy . . . . . *passim*

**TABLE OF APPENDICES**


| | |
|---|---|
| Appendix A: | *West v. Derby Unified School District No. 260,* 206 F.3d 1358 (10th Cir. 2000) |
| Appendix B: | *West v. Derby Unified School District # 260,* unpublished order, (D. Kan. July 27, 1998) (summary judgment on non-First Amendment issues) |
| Appendix C: | *West v. Derby Unified School District # 260,* 23 F.Supp. 1223 (D.Kan. August 11, 1998) (denying declaratory and injunctive relief on First Amendment issues) |
| Appendix D: | "Racial Harassment or Intimidation" Policy of the Derby Unified School District No. 260 |
| Appendix E: | Petitioner T.W.'s drawing of the Confederate battle flag (front and back) |
| Appendix F: | "Notification of Short-Term Suspension" form |

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in *Terry West, individually and as guardian of a minor, T.W., a minor, v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000).

## OPINIONS BELOW

The decision of the Tenth Circuit Court of Appeals is reported at *Terry West, individually and as guardian of a minor, T.W., a minor, v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000), and set out hereinafter as Appendix A. The district court's unpublished summary judgment memorandum and order is set out hereinafter as Appendix B. *See West v. Derby Unified School District # 260*, No. 98-1163-WEB (D. Kan. July 27, 1998). The district court's judgment following trial on the First Amendment issues is reported at *West v. Derby Unified School District # 260*, 23 F.Supp. 2d 1223 (D. Kan. 1999), and set out hereinafter as Appendix C.

## STATEMENT OF JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on March 21, 2000. This Petition for Writ of Certiorari is filed within 90 days of the filing of that judgment, or on or before June 19, 2000.

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 2201, 2202, and pursuant to the First and Fourteenth Amendments of the United States Constitution, and by 42 U.S.C. §§ 1983 *et seq.*

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment, and also involves the due process clause of the Fourteenth Amendment.

The First Amendment states, in pertinent part:

> Congress shall make no law. . . abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment states, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The full text of Derby's "Racial Harassment or Intimidation" policy is set out in Appendix D. The key provision of the policy, as set forth in the Derby Middle School Handbook for Students and Parents, states:

> District employees and student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, Confederate flags or articles, New-Nazi or any other "hate" group. This list is not intended to be all inclusive).
>
> Violations of this policy shall result in disciplinary action by school authorities. For students there will be a three day out-of-school suspension for the first offense...

*See* Appendix D.

## STATEMENT OF THE CASE

The parties do not dispute the following pertinent facts. On April 14, 1998, 7th-grade student T.W. drew a crude sketch of the Confederate flag on a four-inch by six-inch piece of paper while sitting in a small group of four students in his mathematics class at Derby Middle School, a school in the Derby Unified School District No. 260 ("Derby" or "District"). (Confederate flag drawing, App. E). As the trial court would later find, T.W. did not intend to harass or intimidate anyone by drawing the flag, and no one was in fact harassed or intimidated by

the drawing. After T.W. drew the flag, one of the other students in the small group took the drawing and gave it to the mathematics instructor, who later passed it on to the assistant principal.

Since 1996, the Derby school district has maintained a "Racial Harassment or Intimidation" policy which states that students "shall not. . . have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred." Among items specifically banned by Derby pursuant to the policy are "Confederate flags or articles."

The "Racial Harassment or Intimidation" policy was adopted by Derby following complaints to the Office of Civil Rights ("OCR") of the U.S. Department of Education of racial incidents among a small group of students in the school district in 1995. Some of the complaints related to students' improper and harassing use of symbols such as the Confederate flag. After receiving the complaints, OCR notified the school district that it would be conducting a review to determine if the school district was compliant with federal requirements to prohibit the recipient of federal funds from discrimination on the basis of race, color, or national origin. Following Derby's adoption of its "Racial Harassment or Intimidation" policy, and in December of 1997, OCR concluded that the school district had fully implemented the agreement that had been reached between the school district and OCR pursuant to the investigation and regarding racial harassment, and that no further action by OCR was required.

T.W. was aware of the "Racial Harassment or Intimidation" policy and its ban of Confederate flags at the time he drew the symbol in the Spring of 1998.

Despite the "Racial Harassment or Intimidation" policy's prohibitions, however, the school district requires 8th-grade students to possess a textbook entitled "The American Journey" which contains multiple depictions of the Confederate flag within its pages, allows students to have within their possession library books bearing the image of the Confederate flag, and maintains a plaque in the middle school's computer lab depicting all fifty states' flags, two of which contain the Confederate battle flag within their borders and several others of which contain elements of the Confederate battle flag or a Confederate national flag. Students are not disciplined for possession of such items.

The morning after T.W. sketched the Confederate flag, Assistant Principal Brad Keirns called T.W. into his office, and asked T.W. if he had drawn the item. He acknowledged that he had drawn it. Though Mr. Keirns did not believe that T.W. planned to use the flag drawing to harass or intimidate anyone, he suspended T.W. from school for three days because of his possession of the symbol, and pursuant to the "Racial Harassment or Intimidation" policy. Mr. Keirns then filled out a "Notification of Short Term Suspension" form, which he had T.W. sign, and on which Mr. Keirns wrote, under the category "Reason for Suspension," "Racial Harassment / Intimidation." (App. F).

T.W. and his father, Terry West, filed their Verified Complaint in May of 1998, generally seeking a declaratory judgment that the District applied its "Racial Harassment or Intimidation" policy against T.W. in violation of his rights to freedom of speech, equal protection, and due process of law as protected by the First and Fourteenth Amendments to the U.S. Constitution and the Civil Rights Act of 1964, and that the policy is unconstitutionally vague and overbroad on its face. The Wests also sought to enjoin further

enforcement of the policy against T.W. and other Derby students, and sought to remove indications of T.W.'s suspension for "Racial Harassment / Intimidation" from his educational records, given the lack of any finding that T.W. had actually harassed or intimidated another person with the drawing or intended to do so.

The U.S. District Court for the District of Kansas denied the Wests' request for summary judgment pursuant to Federal Rule of Civil Procedure 56 on all counts, and granted Derby's request for summary judgment on all counts save whether the school district violated the First Amendment. Appendix B. After a one-day trial on the merits of the First Amendment issues, the District Court granted final judgment against the Wests and in favor of the school district. In its memorandum and order, the district court held, with regard to the First Amendment claim, "school officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images, when unconnected with any legitimate educational purpose, would likely lead to a material and substantial disruption of school discipline." Appendix C at C20.

The district court ruled that the school district's policy was not overbroad because "the policy permits the administrator to consider whether the student's conduct was willful, whether the student displayed the symbol in some manner, and whether the conduct had the effect of creating ill will, and the district does not interpret the policy to prohibit the use or possession of such symbols for legitimate educational purposes." C25. As to the Wests' vagueness claim, the district court held that T.W. had fair warning of the prohibited conduct because he knew he was violating Derby policy when he drew the flag. C26.

The Tenth Circuit Court of Appeals affirmed, largely adopting the district court's analysis as its own. *See generally* Appendix A.

## REASONS FOR GRANTING THE WRIT

### I.

### THE DECISION OF THE COURT OF APPEALS DIRECTLY CONFLICTS WITH THE SUPREME COURT'S PRIOR RULINGS, INCLUDING *TINKER V. DES MOINES*, AND DRAMATICALLY CURTAILS STUDENTS' FIRST AMENDMENT RIGHTS.

The Tenth Circuit's requirement of a "legitimate educational purpose" for a student to possess a controversial symbol at school is in direct conflict with the Supreme Court's decision in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, the Court considered whether a public school district could suspend students for their willful violation of the school district's policy banning students from wearing black armbands to school to protest the Vietnam conflict. The Court ruled that the school's suspension violated the students' First Amendment rights, holding:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the

> requirements of appropriate classroom discipline in the operation of the school," the prohibition cannot be sustained.

393 U.S. at 509.

The Tenth Circuit, in this case, adopted as its own analysis the ruling of the district court, wherein the district court stated, "school officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images, **when unconnected from any legitimate education purpose**, would likely lead to a material and substantial disruption of school discipline." *West*, 206 F.3d at 1366, A15; *West*, 23 F.Supp. 2d at 1233, C20 (emphasis supplied). Thus, the language of the lower courts' holdings largely tracks with the standard set forth in *Tinker*, except that the lower courts herein have added that a "legitimate educational purpose" is also required for a student to possess a symbol banned by the policy.

To the contrary, this precise criteria was discussed and rejected by the Court in *Tinker*, wherein the Court stated:

> [W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, *or to supervised and ordained discussion in a school classroom.* If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the

> constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

393 U.S. at 513 (emphasis supplied).

The Tenth Circuit's addition of the "legitimate educational purpose" requirement significantly alters the rule of *Tinker*. If a "legitimate educational purpose" is required for a student to possess a controversial symbol at school, it will be left for only the school officials, not the students, to determine what constitutes such a purpose and, accordingly, what expressions students may make.

The principal inherent in *Tinker*, that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate," 393 U.S. at 511, is significantly diminished by a requirement that a student possess a "legitimate educational purpose" for possession of a symbol at school. This holds true even if, as in this case, that symbol is regarded as controversial in the community at large, or within the walls of the school where its possession is restricted. *See also R.A.V. v. City of St. Paul*, 505 S.Ct. 377, 392 (1992) ("the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content").

The conflict is clear and irreconcilable. The Tenth Circuit has limited the application of *Tinker* by requiring that a student show that his school speech on a controversial subject, or his mere possession of a symbol, is made in the furtherance of a "legitimate educational purpose." Certiorari is appropriate.

## II.

## WITHOUT THE TENTH CIRCUIT'S LIMITING CONSTRUCTION OF A "LEGITIMATE EDUCATIONAL PURPOSE," THE POLICY IS SUBSTANTIALLY OVERBROAD AS WRITTEN; WITH THE LIMITING CONSTRUCTION, ITS VAGUENESS IS EXACERBATED.

As written, the "Racial Harassment or Intimidation" policy bans possession of several symbols defined as being "divisive" or creating "ill will or hatred," including the Confederate flag, regardless of the manner in which the items are possessed and regardless of the accompanying conduct of the person in possession. The Wests challenged the policy as overbroad, relying on the Court's admonition that "[i]t is fundamental that statutes regulating First Amendment activities must be narrowly drawn to address only the specific evil at hand." *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973).

In order to reject the Wests' overbreadth argument, the Tenth Circuit limited the expansive prohibitions of the policy as written, and incorporated the unwritten, "legitimate educational purpose," exception into the policy whereby students are *not* punished for having any item banned by the policy when the possession is connected with a "legitimate educational purpose." The Court stated, "[t]o our knowledge, the Derby Middle School has never disciplined a student for possessing textbooks and other school materials with legitimate educational purposes depictions of the Confederate flag or other racially divisive symbols." 206 F.3d at 1358. A19. The Tenth Circuit then agreed with the district court, stating, "as construed by the school district, the harassment or intimidation policy does not threaten protected speech

and is not constitutionally overbroad." 206 F.3d at 1358, *citing West*, 23 F.Supp.2d at 1234-35. A19.

If the Court grants review to consider whether a student must have a "legitimate educational purpose" to possess a controversial symbol that a public school has banned, whether the policy is overbroad will be an important question of Constitutional law that should also be resolved. Without the limiting construction prescribed by the lower courts to this policy, which Petitioner contends is contrary to the Court's *Tinker* decision, the policy as written is substantially overbroad and should be stricken. This holds especially true in light of other existing Derby disciplinary policies that, by their own terms, prohibit "harassment" or "intimidation" of others, "fighting," and "inciting" others.

While the Wests' overbreadth argument relates to the policy as it is written, their vagueness argument deals with the policy as applied with the limiting construction. A policy is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning." *Broadrick*, 413 U.S. at 607. Even before the adoption of the limiting construction, the clear presence of Confederate flag images in the school left students to guess as to what possessions were acceptable and which were punishable under the strict terms of the written rule.

The Court's limiting construction does not temper the vagueness of the policy; it exacerbates it. Where students previously had to guess as to what additional symbols might fall under the "non-inclusive" clause of the policy other than those symbols enumerated therein, now they must also guess as to what constitutes a "legitimate educational purpose" pursuant to which they may possess a banned symbol and not be punished. The vagueness challenge to the policy

constitutes an additional, yet independent, basis for the Court to grant certiorari.

## III.

## THE TENTH CIRCUIT ALSO UNDULY CONSTRICTS THE *TINKER* STANDARD IN ITS TREATMENT OF THE WESTS' EQUAL PROTECTION COUNT, BY UPHOLDING THE SUSPENSION OF T.W. FOR POSSESSION OF A SYMBOL THAT THE PUBLIC SCHOOL ITSELF DISPLAYS IN SCHOOL-APPROVED CONTEXTS.

The Court has recognized successful claims pursuant to the Equal Protection Clause of the Fourteenth Amendment brought by a "class of one" where the plaintiff alleges that he has been treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *See Sioux City Bridge Co. v. Dakota Company*, 260 U.S. 441 (1923); *Village of Willowbrook v. Olech*, __ U.S. __, 120 S.Ct. 1073 (2000).

In this case, the Wests alleged that Derby treated T.W. different from other students possessing Confederate flag images, by punishing him for possessing a hand-drawn image of a symbol that appears in school-approved textbooks and in library books possessed by other students, and which is prominently displayed in the computer lab of the Derby Middle School as part of a display of the 50 states' flags. Moreover, the Wests alleged that no rational basis for the difference in treatment was proven by Derby, given that students may possess, without punishment, such textbooks containing Confederate flag images in math class.

The Tenth Circuit held that "as an arm of the State, the Derby School District may consistent with the Fourteenth Amendment forbid students during school hours and on school grounds from possessing the Confederate flag outside of school-approved materials so long as its policy is rationally related to a legitimate government interest." *West,* 260 F.3d at 1365. A12. The court then went on to state that Derby's "legitimate interest in this case is clear – to prevent potentially disruptive student conduct from interfering with the educational process." *Id.*

The Tenth Circuit's treatment of equal protection principles misses the mark. By approving the ban of Confederate flag symbols "outside of school-approved materials," but by permitting the symbol to be possessed by students within school-approved materials, the Tenth Circuit has condoned a rule whereby the government alone controls the message conveyed by the symbol on school grounds, because the government alone determines how that symbol appears on its walls and within the pages of the government-issued textbooks. Furthermore, there exists no rational distinction between a student's display of a Confederate flag that appears in his textbook, and the student's display of a Confederate flag of his own making.

The irrationality of the lower court's decision is further illustrated in light of the trial testimony of Assistant Principal Keirns that he was aware of, but did not punish, a student for displaying the Nazi swaztika on a display relating to the Holocaust; thereby confirming that the school district does not object to some speech by students relating to symbols banned by the "Racial Harassment or Intimidation" policy, even if the speech occurs outside of "school-approved" texts. *West, 23* F.Supp.2d at 1231. C16.

> Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select what issues are worth discussing or debating in public facilities. There is an 'equality in the status of ideas,' and government must afford all points of view an equal opportunity to be heard.

*Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

The Tenth Circuit has approved what the Court previously has called "censorship in a most odious form" and "an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Cox v. Louisiana*, 379 U.S. 536 (1965) (striking Louisiana law specifically permitting picketing for publication of labor union views, while prohibiting other forms of picketing). Certiorari should be granted to correct this egregious error of constitutional law.

## IV.

## THE TENTH CIRCUIT MISAPPLIED DUE PROCESS PRINCIPLES BY ALLOWING T.W.'S SUSPENSION FOR "RACIAL HARASSMENT / INTIMIDATION" TO STAND DESPITE THE ADMINISTRATOR'S LACK OF ANY FINDING THAT T.W. DID OR INTENDED TO HARASS OR INTIMIDATE WITH THE SYMBOL

Review should also be granted to examine the extent to which this "zero tolerance" policy against student speech violated T.W.'s right to due process of

law. The Tenth Circuit disagreed that the policy in question is a "zero tolerance" policy, after taking into account the limiting construction applied by those courts. *West*, 206 F.3d at 1364, fn. 3. A11. The policy, as written, mandates, however, that upon finding a student in possession of the prohibited symbol, the school administrator "shall" impose a suspension on the possessing student of three days. Appendix D, ¶ 2. Per the written policy, the circumstances surrounding the possession, including the student's intent, are not considered. By the terms of the written policy, the Confederate flag is reduced to an item of contraband by the state.

The trial court acknowledged that Assistant Principal "Keirns did not believe, and there was no evidence to suggest, that T.W. planned to use the flag to harass or intimidate anyone," *West*, 23 F.Supp.2d at 1229. C15. Still, the administrator suspended T.W. and the lower courts judged the process afforded T.W. sufficient because T.W. "knowingly and intentionally" violated the school policy which plainly prohibited drawing the Confederate flag. *West*, 260 F.3d at 1363, *citing West*, 23 F.Supp.2d at 1230, 1334 (where the trial court justifies the suspension because the violation of the policy was "willful," defined as in "willful" violation of existing policy). A11, A20.

The lower courts' reasoning runs contrary to the principle that a person may willfully challenge an unconstitutional policy by violating it. *See, e.g., Tinker*, 393 U.S. at 504 ("[p]etitioners were aware of the regulation that the school authorities adopted" before violating it). Under the Tenth Circuit's reasoning, any unconstitutional policy is permissible as long as it is well-publicized.

A fundamental tenet of due process is that the hearing afforded to students must be "meaningful" and "appropriate to the nature of the case." *Bell v. Burson*, 402 U.S. 535, 543 (1971). In this case, where the student's speech was punished, absent a finding that the Confederate flag itself is altogether inappropriate for students of T.W.'s age, *see, e.g., Bethel School District No. 404 v. Fraser*, 478 U.S. 682 (1986) (vulgar and age-inappropriate language by student at school assembly may result in student discipline), a finding which would contradict the school's own display of the symbol in its texts and on its walls, any process given to T.W. should have given consideration to the actual effect of the speech on other students, or the intent of the speaker. Without such a finding, the administrator's discipline of T.W. was based on an unreasonable belief that T.W.'s possession "would materially and substantially" interfere with school discipline. This made the process afforded to T.W. insufficient, because it did not take into account his intent or the effect of his speech on others. The Court should grant certiorari to review the appropriate process due under a "zero tolerance" policy against student speech.

Furthermore, although a record was placed in T.W.'s disciplinary file that he committed "Racial Harassment / Intimidation" (App. F), he was accorded no process as to whether he had done the wrong the policy was aimed to prevent: commit racial harassment or intimidation. The disciplinary record does not indicate that his suspension resulted from his non-harassing possession of a Confederate flag drawing; it states that he committed "Racial Harassment / Intimidation," an act for which no finding was made. As the Supreme Court stated in *Goss v. Lopez*, 419 U.S. 565, 574 (1975), "[t]he Due Process Clause will not shield [a student] from suspensions properly imposed, but it disserves both his interest and the interest of the

state if his suspension is in fact unwarranted." The Court should grant the Wests' request for review on their due process argument.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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June 19, 2000

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TERRY WEST, individually and as guardian of a minor, T.W.; T.W., a minor, Plaintiffs-Appellants, v. DERBY UNIFIED SCHOOL DISTRICT NO. 260, Defendant-Appellee.

No. 98-3247

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 98-C V-i 163)
(23 F. Supp. 2d 1223)

Jason M. Sneed of Lathrop & Gage L.C., Overland Park, Kansas, for Plaintiffs-Appellants.

Jeffrey L. Griffith of Griffith & Griffith (M. Kathryn Webb and Richard J. Liby of McDonald, Tinker, Skaer, Quinn & Herrington, P.A., Wichita, Kansas, with him on the brief), Derby, Kansas, for Defendant-Appellee.

Robert L. Hawkins, III of Hawkins Law Offices, Jefferson City, Missouri, filed an Amicus Curiae Brief for Sons of Confederate Veterans, Inc., in support of Plaintiffs-Appellants.

Julie Underwood of National School Boards Association, Alexandria. Virginia, and Cynthia Lutz Kelly of Kansas Association of School Boards, Topeka, Kansas filed an Amicus Curiae Brief in support of Defendant-Appellee.

Before BALDOCK, McWILLIAMS,. and ANDERSON

Circuit Judges.

BALDOCK, Circuit Judge:

Defendant Derby Unified School District # 260 is a school district in Sedgwick County, Kansas, responsible for operating Derby Middle and High Schools. In response to incidents of racial tension between black and white students at Derby High School during 1995, the school district adopted a "Racial Harassment and Intimidation" policy which provides in relevant part:

> District employees and student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive). Violations of this policy shall result in disciplinary action by school authorities. For students there will be a three day out-of-school suspension for the first offense with a required parent conference prior to readmittance....(emphasis added).

Derby Middle School's assistant principal, Brad Keirns, suspended Plaintiff T.W., then a seventh grade student, for three days during the 1997-98 academic year after T.W. drew a Confederate flag on a piece of paper during math class in violation of the district's policy. T.W.'s father promptly filed suit for injunctive relief against the school district on his son's behalf under 42 U.S.C. § 1983 alleging that the school district's policy (1) violated his son's First Amendment free speech right, (2) was unconstitutionally vague and overbroad, (3) violated his son's Fourteenth Amendment right to procedural due process, and (4) violated his son's Fourteenth Amendment right to equal protection.

On the parties' cross motions for summary judgment, the district court ruled in favor of the school district on T.W.'s due process and equal protection claims. See West v. Derby Unified Sch. Dist. # 260. No. 98-1 163-WEB, unpub. order (D. Kan. July 27, 1998). The court held that T.W. received the process due him because before deciding to suspend T.W., the assistant principal informed T.W. of the basis for the charge against him, and gave him an opportunity to present his side of events, which T.W. did in writing. Id. at 18. The court further held that the school district's policy did not violate equal protection by discriminating against students who possessed the Confederate flag to express a viewpoint, rather than for legitimate educational purposes. Id. at 18-19. The district court reserved ruling on the questions of whether the school district's policy violated T.W.'s free speech right, or was vague and overbroad, until after a bench trial.

Following trial, the district court entered judgment in favor of the school district on all counts.

See West v. Derby Unified Sch. Dist. # 260, 23 F. Supp. 2d 1223 (D. Kan.1998). As to T.W.'s free speech claim, the district court held that the school district's policy did not violate the First Amendment because "school officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images, when unconnected with any legitimate educational purpose, would likely lead to a material and substantial disruption of school discipline." Id. at 1232. As to T.W.'s claim that the district's policy was overbroad, the court held that the policy was not unconstitutionally overbroad as applied by school administrators, because "the policy permits the administrator to consider whether the student's conduct was willful, whether the student displayed the symbol in some manner, and whether the conduct had the effect of creating ill will, and the district does not interpret the policy to prohibit the use or possession of such symbols for legitimate educational purposes." Id. at 1234-3 5. As to T.W.'s claim that the policy was void for vagueness, the court held that the policy provided T.W. fair warning of his prohibited conduct because T.W. knew he was violating the school district's policy when he drew the flag. Id. at 1235.

T.W. appeals, raising the same arguments against the school district that he did in the district court. We exercise jurisdiction under 28 U.S.C. § 1291. We review the ultimate question of the constitutionality of the school district's actions de novo. See United States v. Kimball, 73 F.3d 269, 272 (10th Cir. 1995). We review the underlying factual basis for the district court's decision for clear error. Id. Applying this standard, we affirm the judgment of the district court substantially for the reasons stated in the district court's two opinions.

I.

A detailed recitation of the district court's findings of fact in this case, which are amply supported by the record and neither party seriously disputes, is ably set forth in the district court's second opinion. 23 F. Supp. 2d at 1225-31. We need not fully repeat those findings here. Suffice it to say that in early 1995, several verbal confrontations occurred between black and white students at Derby High School. Some white students wore shirts bearing the image of the Confederate flag, while some black students wore shirts with an "X", denoting support for the teachings of Malcolm X. Members of the Aryan Nation and Ku Klux Klan became active off campus circulating materials to students encouraging racism. Around the same time, graffiti stating such things as "KKK" (Ku Klux Klan), "KKKK" (Ku Klux Klan Killer), and "Die Nigger" appeared on campus in bathrooms and on walls and sidewalks. School officials received reports of racial incidents on school buses and at football games. At least one fight broke out as a result of a student wearing a Confederate flag headband. The Derby Middle School was not immune from the racial tensions. Although the tensions were not widespread and involved relatively few students at the middle school, incidents occurred involving the Confederate flag. These included students drawing the Confederate flag on their notebooks and arms.

In response to the situation, the Derby School District organized a 350-member task force comprised of parents, teachers, and other community members to propose a course of action for the district. The task force recommended the adoption of a racial harassment policy to help alleviate the problem. The school district subsequently adopted the "Racial Harassment and Intimidation" policy at issue in this case. The policy resulted in a "marked decline of incidents of racial harassment and discord" in the school district. Id. at

1228. "The number of referrals in the middle school dealing with racial problems in the last two years are significantly lower than the number observed in 1996." Id.

At the beginning of each school year, the school district requires all students at the middle school to review a student handbook which sets forth the school district's policies, including the harassment and intimidation policy. In August 1997, T.W. signed an acknowledgment form stating: "'I have reviewed and understand the disciplinary policy at DMS as outlined in the DMS agenda book.'" Id. Teachers at the middle school then reviewed the policies in the handbook with students, including T.W. Nevertheless, T.W. became involved in numerous disciplinary incidents during the 1997-98 school year. At one point, T.W. received a three-day suspension for calling another student "blackie." After another incident, T.W. had an administrative conference with the school's assistant principal, who reviewed the harassment and intimidation policy with T.W. Accordingly, T.W. was well aware of the school district's policy prohibiting the drawing of the Confederate flag.

On April 14, 1998, during math class at the Derby Middle School, T.W., at the prompting of another student, drew a Confederate flag on a piece of paper. The other student took the drawing and showed it to the math teacher. The teacher turned the drawing over to the school's assistant principal. When confronted, T.W. admitted to the assistant principal that he had drawn the picture and provided a written statement regarding the occurrence.[1]

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[1]T.W.'s statement read:

Pursuant to the school district's policy, the assistant principal suspended T.W. from school for three days. The school district did not dispute that T.W. never intended to harass or intimidate any student by drawing the Confederate flag. The assistant principal, however, did consider certain factors outside the policy language to reach his decision, namely that (1) prior to the incident he had reviewed the harassment and intimidation policy with T.W., (2) T.W. intentionally violated the policy, (3) T.W. displayed his drawing to another student, and (4) other students warned T.W. not to draw the Confederate flag. Based on this evidence, the district court concluded:

> The intimation that T.W. acted innocently and without any improper purpose is contrary to the evidence. While T.W. may not have intended to harass anyone by drawing the Confederate flag, it is clear to the court that he knowingly and intentionally violated the policy against possession of such symbols at school.

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I was sitting in math class and I had a piece of paper that I was going to make a plane on and Dusty Houston told me write a rebel flag on it and I said no and he asked me if I even knew what it was and I said yes but I didn't know what it meant. So I drew it and he turned me in.

Appellee's App. at 281. Statements obtained from two other students who had been sitting with T.W. in math class indicated they warned T.W. that he would get in trouble if he drew the Confederate flag. One student wrote that T.W. "said he didn't care and drew it anyway." Id. at 283.

Id. at 1230.[2]

II.

A constant theme throughout T.W.'s legal argument is that his drawing of the Confederate flag was "peaceful and nonthreatening." T.W. argues that "without any finding that T.W. intended to actually harass or intimidate any person by said possession, the school district unconstitutionally applied its policy against T.W." We now consider each of T.W.'s constitutional arguments in turn, rejecting any notion that the Constitution requires a finding of an intent to harass or intimidate before the Derby School District may apply its "Racial Harassment and Intimidation" policy to noncomplying students. Instead, we reaffirm the principle that "judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint....By and large, public education in our Nation is committed to the control of state and local authorities." Epperson v. Arkansas. 393 U.S. 97, 104 (1968).

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2 The district court viewed T.W.'s testimony regarding the events surrounding his suspension with skepticism:

> "To put it charitably, the court finds that T.W. demonstrated a 'convenient memory' when he recounted those events. T.W. attempted, as some adolescents in such a situation are inclined to do to minimize any evidence that he knew his actions were wrong." 23 F. Supp. 2d at 1230.

A.

We first address T.W.'s argument that "by denying him any meaningful opportunity to contest whether he actually 'harassed' or 'intimidated' any student or intended to do so, the school district denied T.W. his right to due process... as guaranteed by the Fourteenth Amendment." No one disputes that a student faced with the possibility of suspension from public school is entitled to due process. The Supreme Court put that issue to rest in Goss v. Lopez 419 U.S. 565, 579 (1975) ("Students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.") (emphasis in original). The next question then is what process is due a student faced with the possibility of a three-day suspension from school. Goss resolved that issue as well. As to public school suspensions of ten days or less-

> Due process requires...that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.... There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at the discussion, the student first be told what he is accused of doing and what the basis of the accusation is.

419 U.S. at 581-82.

On appeal (unlike in the district court), T.W. does not seriously argue, nor could he, that he failed to receive the process due him under Goss. The assistant principal plainly gave T.W. notice of the charges against him and an opportunity to present his side of events before deciding to suspend him. The assistant principal determined that T.W. had wilfully violated the school district's harassment and intimidation policy, which T.W. knew prohibited his drawing of the Confederate flag.

Instead, T.W. argues that he failed to receive any "meaningful" hearing in the matter because the assistant principal never found that T.W. intended to harass or intimidate anyone by drawing the Confederate flag. T.W.'s argument is meritless. Goss sets forth the requirements of a "meaningful" hearing, which is exactly what T.W. received, in connection with school suspensions often day or less. T.W. in effect asks us to impose an intent element upon the school district's policy similar to that of a criminal statute. Yet public school districts are not courts of law and their disciplinary policies and procedures do not equate with penal codes. To impose in "countless" disciplinary suspensions a requirement that the suspect student possess a mens rea akin to criminal intent might well require trial-like procedures and proof which could "overwhelm administrative facilities in many places and by diverting resources, cost more than it would save in educational effectiveness." Id. at 583.

This is not to say that educators should ignore a student's intentions in addressing disciplinary matters. But "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the

value of preserving the informality of the student-teacher relationship." New Jersey v. T. L. 0, 469 U.S. 325, 340 (1985). In this case, the district court found that after T.W. received notice and an opportunity to be heard, the assistant principal suspended him for "knowingly and intentionally" violating a school district policy which plainly prohibited drawing the Confederate flag-a policy with which T.W. was well familiar. West. 23 F. Supp. 2d at 1230. That finding is not clearly erroneous, but rather is supported by the overwhelming weight of the evidence. We conclude that T.W. received all the process due him under the Fourteenth Amendment.[3]

B .

T.W. next asserts that the school district violated his "rights as protected by the Equal Protection Clause in that [the district] has 'selectively' excluded his possession of the Confederate flag," while permitting other students to possess the flag in history books and other approved materials. The district court properly

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3 Despite T.W.'s claim to the contrary, the school district's harassment and intimidation policy is not a "zero tolerance" policy, removing decision making authority from school officials and depriving students of "meaningful" process. As the district court found, West 23 F. Supp. 2d at 1229, numerous factors aside from the plain language of the policy went into the assistant principal's decision to suspend T.W. Those factors were "that T.W. admitted to making the drawing, that other students saw the drawing, that other students had warned T.W. not to make the drawing, and that [the assistant principal] had reviewed the Racial Harassment and Intimidation policy with T.W. following a previous incident." Id.

noted that the question of whether a legitimate government interest supports the school district's content-based restriction is essentially an inquiry into whether the restriction violates T.W.'s First Amendment free speech right. Thus, T.W.'s equal protection claim is more properly considered together with his First Amendment challenge. See R. A. V. v. City of St. Paul 505 U.S. 377, 384 n.4 (1992). Still, T.W. insists on propounding his equal protection argument on appeal.

First Amendment concerns aside for the moment, we note that public school students are not a suspect class under the Equal Protection Clause. Thus, as an arm of the State, the Derby School District may consistent with the Fourteenth Amendment forbid students during school hours and on school grounds from possessing the Confederate flag outside of school-approved materials so long as its policy is rationally related to a legitimate government interest. This is all the Equal Protection Clause requires. See Kimel v. Florida Bd. of Regents, 120 5. Ct. 631, 645-46 (2000). The school district's legitimate interest in this case is clearly to prevent potentially disruptive student conduct from interfering with the educational process. We easily conclude that the school district's harassment and intimidation policy did not violate T.W.'s right to equal protection under the Fourteenth Amendment.

C.

We also conclude that the Derby School District did not violate T.W.'s First Amendment right to free speech when it suspended him from school for three days after he drew a picture of the Confederate flag during class in violation of the school district's

harassment and intimidation policy.[4] To be sure, T.W.'s display of the Confederate flag could well be considered a form of political speech to be afforded First Amendment protection outside the educational setting. And while students do not 'shed the constitutional rights to freedom of speech or expression at the schoolhouse gate," Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969), the Supreme Court has recognized that the –

> First Amendment rights of students in public schools are not automatically

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4 At least two other circuits have addressed student suspensions based upon display of the Confederate flag. In Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), a divided panel of the Sixth Circuit held that a student's suspension for refusal to stop wearing a Confederate flag patch did not violate his First Amendment rights where substantial racial disorder had occurred at the racially integrated school and school officials had every right to anticipate that a tense racial situation continued to exist. Just last summer in Denno v. School Bd. of Volusia County. Fla.. 182 F.3d 780 (11th Cir.), vacated 193 F.3d 1178 (11th Cir. 1999) a panel of the Eleventh Circuit reversed the district court's dismissal of a student's complaint alleging a violation of his First Amendment rights when school officials suspended him for displaying a picture of the Confederate flag. Accepting the complaint's allegations as true, the court stated that a student had a right to display the flag which gave rise to nothing greater than a undifferentiated fear or apprehension of disturbance. Interestingly, three months later, the panel vacated its opinion and ordered rehearing before the panel. As of today, the case remains pending.

> coextensive with the rights of 'adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school.

Hazelwood Sch. Dist. v. Kuhlmeier. 484 U.S. 260, 266 (1988) (internal citations and quotations omitted). See also Bethel Sch. Dist. No. 403 v. Fraser. 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom... is inappropriate properly rests with the school board."). Thus, where school authorities reasonably believe that a student's uncontrolled exercise of expression might "substantially interfere with the work of the school or impinge upon the rights of other students," Tinker 393 U.S. at 509, they may forbid such expression.[5]

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5 In Tinker students were suspended pursuant to a hastily enacted school policy that forbid the wearing of black armbands in protest of the Vietnam war. In overturning the students' suspension, the Court emphasized repeatedly that no showing had been made that engaging in the forbidden conduct would "materially and substantially interfere with the requirement of appropriate discipline in the operation of the school." 393 U.S. at 509. Unlike here, "the wearing of armbands in the circumstances of that case was entirely divorced from actually or potentially disruptive conduct." Id. at 505 (emphasis added). The Court further noted that the school had singled out for prohibition only black armbands. Other controversial and political symbols were not forbidden. Id. at 510-11.

Of course, school officials' "undifferentiated fear or apprehension" of a disturbance is not enough to overcome a student's right to freedom of expression. Id. at 508. The evidence in this case, however, reveals that based upon recent past events, Derby School District officials had reason to believe that a student's display of the Confederate flag might cause disruption and interfere - with the rights of other students to be secure and let alone. See id. As a result of racial tensions in the school district which threatened to disrupt the educational process, these officials approved the "Racial Harassment and Intimidation" policy. We believe the district court was correct in rejecting T.W.'s First Amendment challenge to the school district's policy, 23 F. Supp. 2d at 1231-34, and adopt its analysis as our own:

> [S]chool officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images, when unconnected with any legitimate educational purpose, would likely lead to a material and substantial disruption of school discipline. The district experienced a series of racial incidents or confrontations in 1995, some of which were related to the Confederate flag. The incidents included hostile confrontations between a group of white and black students at school and at least one fight at a high school football game. The Racial Harassment policy enacted in response to this situation was clearly something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. The

> history of racial tension in the district made administrators' and parents' concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable. The fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one.... In this case, the district had a reasonable basis for forecasting disruption from display of such items at school, and its prohibition was therefore permissible.... The fact that T.W.'s conduct may not have resulted in an actual disruption of the classroom.., does not mean that the school had no authority to act. The district had the power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance.

Id. at 1233 (internal citations and quotations omitted). Accordingly, T.W.'s First Amendment free speech challenge to the school district's policy fails.

D .

T.W. also presents a facial challenge to the school district's harassment and intimidation policy, arguing that the policy is unconstitutionally vague and overbroad. T.W. asserts that "because the policy fails to adequately warn students what symbols they are prohibited from possessing and brings within its scope so much innocent conduct" the policy must be stricken as both vague and overbroad. Until the harassment and

intimidation policy "is narrowed to reach only unprotected activity," T.W. claims we should bar its enforcement entirely.

We begin with the precept that "[a] facial challenge to a [law] is... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the law would be valid." United States v. Salerno. 481 U.S. 739, 745 (1987). "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a [law] may constitutionally be applied will not be heard to challenge that [law] on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." Broadrick v. Oklahoma 413 U.S. 601, 610 (1973). As the Supreme Court recently explained in Los Angeles Police Dept. v. United Reporting Publ'g Corp.. 120 5. Ct. 483, 489 (1999):

> This general rule reflects two "cardinal principles" of our constitutional order: the personal nature of constitutional rights and the prudential limitations on constitutional adjudication. "By focusing on the factual situation before us, and similar cases necessary for a constitutional rule, we face 'flesh and blood' legal problems with data 'relevant and adequate to an informed judgment.'"

(internal citation omitted) (quoting New York v. Ferber 458 U.S. 747, 767-68 (1982)). Consistent with the foregoing, we believe cases of alleged unconstitutional enforcement of a public school district's disciplinary policies, like any other laws, are best addressed in most instances "when (and if) they arise, rather than prophylactically through the disfavored mechanism of a

facial challenge." City of Chicago v. Morales 527 U.S. 41, (1999) (Thomas, J.. dissenting) (citing Salerno, 481 U.S. at 745).

One exception exists, however, to the rule that courts will not pass upon facial challenges to laws. The exception is First Amendment challenges to laws based on overbreadth. United Reporting Publ'g, 120 S. Ct. at 488. Yet, the overbreadth doctrine is "not casually employed." Id. at 489. "Because of the wide-reaching effects of striking down a [law] on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then, 'only as a last resort.'" Id. A court should address an overbreadth challenge to a law only when the law may have a chilling effect on the free speech rights of parties not before the court. See id. at 488.

To the extent that T.W.'s facial challenge to the school district's policy seeks to rely on the effect the policy may have on parties not before the court, his challenge fails. This is because "no realistic danger" exists that the Derby School District's policy will "significantly compromise recognized First Amendment protections of parties not before the court." Members of the City Council v. Taxpayers for Vincent 466 U.S. 789, 801 (1984). In discerning the reach of the policy, we consider any limiting construction which the school district has given the policy. See Osborne v. Ohio. 495 U.S. 103. 120 & n. 14 (1990) (a law may be construed to avoid potential overbreadth problems). The district court correctly recognized that as construed by the school district-

> the policy permits the administrator to consider whether the student's conduct

> was willful, whether the student displayed the symbol in some manner, and whether the conduct had the effect of creating ill will, and the district does not interpret the policy to prohibit the use or possession of such symbols for legitimate educational purposes. These limitations make it likely that the policy will only apply in circumstances where it is constitutional to do so.... The evidence does not show a substantial danger that the policy will significantly compromise the First Amendment rights of other students.

West, 23 F. Supp. 2d at 1234-35. To our knowledge, the Derby Middle School has never disciplined a student for possessing in textbooks and other school materials with legitimate educational purposes depictions of the Confederate flag or other racially divisive symbols. Like the district court, we conclude that as construed by the school district, the harassment and intimidation policy does not threaten protected speech and is not unconstitutionally overbroad.

Similarly, the school district's policy is not unconstitutionally vague. The Derby School District's harassment and intimidation policy might be void for vagueness if a reasonable student of ordinary intelligence who read the policy could not understand what conduct it prohibited. See Broadrick, 413 U.S. at 608. Still, "[g]iven the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process,... school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." Bethel Sch. Dist. 478 U.S. at 686. We are satisfied that at the time of the occurrence little question existed in the mind of T.W. as to the meaning of the school district's policy or

whether it prohibited him from drawing the Confederate flag during class. The policy expressly prohibits any student from possessing in his own handwriting a depiction of the Confederate flag. T.W. had reviewed the policy on multiple occasions. Moreover. T.W. admits that the district court "correctly stated that T.W. knew that the act of drawing a Confederate flag violated written school policy." See United States Civil Serv. Comm'n v. National Ass'n. of Letter Carriers. 413 U.S. 548, 579 (1973). As the district court concluded: "Such a state of mind is inconsistent with any claim that the policy did not give [T.W.] fair warning that his conduct was prohibited." West 23 F. Supp. 2d at 1235.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TERRY WEST, individually and as guardian of T.W., and T.W., a minor, Plaintiffs v. DERBY UNIFIED SCHOOL DISTRICT # 260, Defendant.

No. 98-1163-WEB

Memorandum and Order

This matter came before the court on motions for summary judgment filed by both parties. (Docs. 27, 40 & 44) . The court ruled orally on these motions at a hearing on July 16, 1998. This written memorandum will supplement the court's previous oral ruling.

I. Facts .

Based on the materials submitted by the parties, the court finds for purposes of summary judgment that there is no genuine dispute as to the following facts.

A. Uncontroverted Facts from Plaintiffs' Statement.

Plaintiff T.W. is a minor, an individual and resident of the State of Kansas, and a student at Derby Middle School, a school in the Derby Unified School District#260(p1. #6.)

Defendant Derby Unified School District #260 is a school district of the State of Kansas located in Sedgwick County. (P1.#7)

The Board of Education of Derby USD 260 adopted and implemented a self-described "USD-260 District-Wide Disciplinary Policy Statement." (P1. #8) .

As part of that statement, the Board adopted and implemented a "Racial Harassment or Intimidation" policy, which applied to all Derby USD 260 students. (P1. #9)

The Racial Harassment or Intimidation policy provides:

> Student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs, wearing or possessing items depicting or implying racial hatred or prejudice. Students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Aryan Nation - White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)
>
> Violations of this policy shall result in disciplinary action by school authorities. There will be a three day out-of-school suspension for the first offense with a required parent conference prior to readmittance. The second offense will result in a three to five day out-of-school suspension with a possible expulsion hearing. The third offense will result in a suspension from school pending an expulsion hearing.
>
> Any student who believes he or she has

been subjected to racial harassment should discuss the problem with his/her principal, or another certified staff member. Initiation of a racial harassment complaint will not cause any adverse reflection of the student. The initiation of a student's complaint shall not adversely affect the job security or status of any employee or student until a finding of fact determines that improper conduct occurred. Strict confidentiality shall be maintained throughout the complaint procedure. (Policy subject to change based upon change in district policy.)

T.W. was, at the time of the filing of the verified complaint, a 7th-grade student at Derby Middle School,a school that is part of Derby USD 260. (P l. #11).

On April 14, 1998, during his mathematics class at Derby Middle School, T.W. drew a picture of a Confederate flag on a piece of paper. (Pl. #12; Pl. Exh.B).

T.W.'s mathematics teacher came into possession of the Confederate flag drawn by T.W., and gave the picture to a Derby Middle School administrator. (Pl. #13)

The following morning, April 15, 1998, T.W. was called into the Derby Middle School assistant principal's office to discuss the picture. (Pl. #14).

Assistant Principal Brad Keirns, an agent and employee of Derby USD 260, informed T.W. that he had violated the Racial Harassment or Intimidation policy by having in his possession the hand-drawn picture of the Confederate flag. (Pl. #15)

Mr. Keirns informed T.W. that under the district's policy, and in accord with the suspension procedures of the district's "zero tolerance" policy mandating certain minimum penalties for violation of school policies, that T.W. was suspended from school for the rest of the school day on April 15, 1998, and for the following three school days. (Pl. #16)

Mr. Keirns telephoned T.W.'s father, Terry West, at approximately 9:40 a.m. on April 15, 1993 and asked Mr. West to come to school and pick up his son, because T.W.'s possession of a hand-drawn image of the Confederate flag warranted an immediate three-day suspension under district policy. (Pl. #17)

Neither T.W. nor his parents were given written notice of a hearing by the district to dispute or discuss the charges against him. (Pl. #18)

A formal hearing regarding the charges against T.W. was not held. (Pl. #19)

On April 27, 1998, Terry West attended a meeting of the Board of Education of USD 260. He asked the Board to rescind its policy and to not suspend any more students from school for possessing articles bearing a Confederate flag. The Board informed him that it would stand by its policy and would not amend it. (P1.##20-22)

On April 22, 1998, approximately one week following the suspension of T.W. from Derby Middle School, Derby USD 260 issued a News Release defending its application of the Racial Harassment or Intimidation and zero tolerance policies against T.W. (Pl. #39; Doc. 1, Exh. C) . The title of the News Release read as follows: "Skewed Reports on Middle School Student's Suspension Set Negative

Tone; Father Refuses to Release Student's Discipline Reports." Pl. #41) . The release also stated in part:

> State and federal confidentiality laws prohibit the district from discussing the report compiled by the middle school in regard to the DMS student's suspension which would provide a more accurate view of the situation. Likewise, a request by the district for permission from the father to release the student's discipline records was denied after he reviewed the file. (Pl. #40)

The district, as part of its history and/or geography curriculum, requires middle school students to possess certain books that contain images of the Confederate flag. (Pl. #42, 43) The Derby Middle School library has numerous publications that contain images of the Confederate flag, and students are allowed by the district to have these items in their possession. (Pl. #44) Additionally, the U.S. Postal Service has published stamps bearing the image of the Confederate flag, and students are allowed to have these items in their possession at schools within the district. (Pl. #45)

B. Uncontroverted Facts from Defendant' s Statement[1].

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1 Plaintiffs' Response to Defendant's Motion for Summary Judgment contains extensive argument relating to Defendant's Statement of Uncontroverted Facts. Many of plaintiffs' objections assert that the defendant is attempting to rely on irrelevant testimony or upon inadmissible hearsay. See Thomas v. International Business Machines, 48 F.3d 478, 485 (10th Cir. 1995) (Summary judgment evidence need not

In early 1995, racial tension developed among certain groups of students attending Derby USD 260 schools. In particular, a group of students at Derby High School holding strong views on "white supremacy" provoked confrontations with groups of African-American students. (Def. #4)

Numerous potentially violent encounters developed. White students wore shirts bearing the image of the Confederate flag. African-American students responded by wearing shirts bearing an "X" denoting support for the teachings of Malcolm X. White students countered by wearing shirts that stated, "You wear your X and I'll wear mine," with a Confederate flag shown to represent the "X" on the back of a shirt. (Def. #5).

The "Aryan Nation" hosted an event directly across the street from the Derby High School to solicit members. The Ku Klux Klan and Aryan Nation passed out literature and pamphlets off campus that students brought to school to distribute. (Def. #6)

Members of the Aryan Nation and Ku Klux Klan circulated materials advocating "white pride"; cautioning against the development of a "race mixed nation"; urging "geographical separation and repatriation of all non-white races from America" and denigrating other groups. (Def. #7)

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be in a form that is admissible at trial, but the content or substance of the evidence must be admissible.). The court has considered these objections in determining which facts are genuinely controverted, but finds that the facts set forth above meet the requirements of admissibility such that they may be considered.

Students advocating white supremacy distributed applications for membership to the KKK and handed out KKK "business cards." Some of the literature bears the Confederate flag insignia. (Def. #8)

The "Knights of the KKK" homepage on the Internet displays a large Confederate flag as its symbol. (Def. #9).

Spray-painted graffiti appeared on the walls at the Derby High School football stadium and on the sidewalks near the Derby Middle School with phrases such as "Die Nigger," "KKK," and "White Power." (Def. #10).

On February 2, 1995, Derby High School administrators sent a letter to all parents of Derby High School students concerning these racial incidents. The district invited all interested citizens to attend a public meeting the following Monday at the school to discuss the facts and to address concerns. (Def. #11) About 300 interested parents, citizens and community leaders attended the meeting. (Def. #12).

The facts leading to the development of the district's racial harassment policy are, by and large, not genuinely controverted. They are set forth in the Defendant's Statement of Uncontroverted Facts, ## 11-23. In essence, the district organized a 350-member community task force to address racial problems in USD260. The task force made recommendations that became the basis for the district's policy. The Board of Education adopted the Racial Harassment or Intimidation policy on June 12, 1995; it was to be incorporated into all student handbooks for grades K-12.

The Office of Civil Rights ("OCR") of the United States Department of Education subsequently notified USD 260 that it would be conducting a review to determine if the district was complying with federal requirements that prohibit recipients of federal funds from discriminating on the basis of race, color, or national origin. (Def. 426) . The OCR's involvement is essentially undisputed and is set forth in defendant's statement of facts at ##26-34. The OCR and USD 260 entered into an agreement designed to ensure that the district prevented racial harassment and applied discipline in a nondiscriminatory manner. In December of 1997, the OCR concluded that the district had fully implemented the agreement and that no further action was required.

On or about August 25, 1997, T.W. signed a "Student Handbook Verification Form" which stated "I Have reviewed and understand the discipline policy at DMS as outlined in the OMS agenda book."

On or about November 6, 1995, T.W. received a short term suspension for directing a racial slur ("blackie") at another student.

On or about February 13, 1998, T.W. received an administrative conference after another student accused him of saying, "What's up nigger" to him. T.W. denied making this statement, and school officials were unable to find witnesses to this statement. T.W. received an administrative conference with his teacher. Derby Middle School officials reviewed the Racial Harassment or Intimidation policy with T.W. during this conference.

On the morning of April 13, 1998, Arden Koehn, T.W.'s math instructor, gave Assistant Principal Keirns the piece of paper with the Confederate flag drawn on

it and told him T.W. had made the drawing in class on the previous day. (Def. #51) . Keirns called T.W., into his office to discuss it. (Def. #52) . Keirns informed T. W. that he was investigating an allegation that T.W. had drawn the Confederate flag and informed him that such a drawing would be a violation of the Racial Harassment or Intimidation policy. (Def.#53).

Mr. Keirns showed T.W. the drawing and asked for his response. T.W. admitted that he had made the drawing. (Def. #54). Mr. Keirns asked T.W. to complete a written statement setting forth his side of the story. In response, T.W. completed the written statement contained at page 36 of Exhibit MM to Defendant's Response to Plaintiffs' Motion for TRO. (Doc. 10) . T.W. completed this written statement prior to Mr. Keirns's decision to suspend him. (Def. #55)

Mr. Keirns further investigated the incident and obtained written statements from two witnesses: Matthew Garvey and Mackenzie Sutton. True and correct copies of their statements are at pages 37 and 38 of Exhibit MM. These statements were obtained prior to Keirns's decision to suspend T.W. Each of these students said in their statement that T.W. was warned by one or more of them that he would get in trouble if he drew the flag. One of the statements said that three students had warned T.W. not to do it or he would be suspended and that T.W. said he didn't care. (Def. #56).

Based upon the information Mr. Keirns had gathered, he determined to suspend T.W. pursuant to the Racial Harassment or Intimidation policy. (Def. #57).

Mr. Keirns presented T.W. with a written notification of short-term suspension which included the basis for and length of the suspension. T.W. signed

this document in Mr. Keirns's presence. A true and correct copy of it is on page 35 of Exhibit MM. (Def. #59).

After Keirns suspended T.W., he learned of another student, Dusty Houston, who had witnessed T.W. make the drawing. Mr. Keirns obtained a written statement from that student. (Def. #60).

Depictions of the Confederate flag appear in some books used at Derby Middle School, and students are not disciplined for possession of these books. (Def.#61)

II. Discussion.

The plaintiffs bring this action under 42 U.S.C. § 1983 alleging that the school district deprived T.W. of rights secured by the Constitution and laws of the United States. In particular, plaintiffs claim T.W. was deprived of: the right to free speech under the First (and Fourteenth) Amendment; the right to due process of law and to equal protection of the laws under the Fourteenth Amendment; the rights granted by the Ninth Amendment; and the rights granted by the Family Educational Rights and Privacy Act (20 U.S.C. § 1232g).

Each side has moved for summary judgment on the claims in the complaint. The standards and procedures for summary judgment are well established and will not be fully repeated here. See Celotex Corp. v Catrett, 477 U.S. 317, 323-24 (1986) . In essence, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Id.

A. First Amendment Claim - Free Speech.

In the court's view, there are two Supreme Court cases particularly relevant to the First Amendment issues in this case. In Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), several public school students sued their school district after they were suspended for wearing black armbands to school to protest the Vietnam War. In a rather famous quote, the Supreme Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Id. at 506. The Court also recognized, however, that public school officials have to have authority to control studentconduct in the schools. In determining the appropriate balance between the rights of students and the authority of the schools, the Court declared that "conduct by the student, in class or out of it, which for any reason, whether it stems from time, place, or type of behavior - materially disrupts classwork or involves substantial disorder or invasion of the rights of others" is not protected by the constitutional guarantee of freedom of speech. Id. at 513. The Court ultimately found that the suspension for wearing armbands did not meet this test, because there was no evidence that such conduct materially interfered with the work of the school or with the rights of others. Although the school argued that it feared the students' actions would create a disturbance, the Court said such an "undifferentiated fear" was insufficient absent evidence from which the school authorities had reason to anticipate that the conduct would in fact do so. Id. at 508.

In a more recent case, Bethel School District v. Fraser, 478 U.S. 675 (1986), a public school suspended a student after he gave a speech containing offensive sexual innuendo at a school assembly. In finding that

the school did not violate the student's rights, the Supreme Court noted it had previously found that the constitutional rights of students in public schools are not co-extensive with the rights of adults in other settings. Id. at 682. Part of the basic mission of a public school, the Court noted, is to impart values fundamental to democracy, including habits and manners of civility. Id. at 681-83. Thus "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." Id. at 557. The Court indicated that a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school. Id. at 355. Thus, the Court concluded that the Constitution did not prohibit the student's suspension for using this type of speech, and stated that the determination of what manner of speech was inappropriate rested with the school board. Id. at 683.

With this background in mind, the parties' contentions under the First Amendment may be summarized as follows. Plaintiff T.W. argues that the district's racial harassment policy, both on its face and as applied, violates his right to free speech. He argues that the school district cannot prove that his possession of the Confederate flag drawing materially and substantially interfered with school discipline, and he contends that such a showing is required under Tinker before a school can prohibit student expression. He also argues that the school's policy is unconstitutionally overbroad for four reasons: 1) it penalizes students for engaging in speech that would not materially and substantially interfere with school operation; 2) the policy says the list of prohibited symbols "is not intended to be all inclusive"; 3) it prohibits the mere

possession of symbols even if they are not used to harass anyone; and 4) it prohibits possession of such symbols even if no one is actually harassed. Finally, plaintiff argues that the policy is unconstitutionally vague because it fails to give students adequate warning as to what is punishable and because it fails to state who will determine what material "creates ill will or hatred" or what is a "hate group."

For its part, the school district argues that this case is distinguishable from Tinker because there is evidence here of a history of disturbances in the district relating to racially divisive materials, including Confederate flag symbols. Because of this, defendant argues, the school could reasonably forecast a disruption from possession of items such as the Confederate flag. The defendant contends that it's policy is not overbroad because there is no realistic danger that the policy will inhibit the First Amendment rights of other students. The District denies that the policy is enforced in a "zero tolerance" manner and cites the affidavit of the Middle School assistant principal, who states that the school does not enforce the policy to prohibit students from possessing images of the Confederate flag in school textbooks or for other legitimate educational purposes. As such, defendant argues, there is no danger of students being punished for a non- harassing use of a Confederate flag. Defendant argues that plaintiff's vagueness claim fails because the policy specifically prohibits possession of a Confederate flag; plaintiff thus cannot claim he did not know his conduct was prohibited. The District argues that the policy is clear enough that a person of reasonable intelligence would understand what is prohibited.

With respect to the First Amendment claims, the court finds that both parties' motions for summary

judgment should be denied. It appears there are several material facts in dispute on this claim, including facts relating to the history and extent of racial disturbances at or affecting the Derby Middle School, whether it was reasonable for the district to believe that possession of items such as the Confederate flag would lead to a material and substantial disruption of school discipline or operations, whether possession of such items is inconsistent with the school's mission to teach students civility and tolerance, the manner in which the district has applied or intends to apply its racial harassment policy, the factors relied upon by the district in finding that T.W. violated the policy, the facts surrounding T.W.'s drawing of the flag, and T.W.'s state of mind at the time he drew the flag.

B. Right to Due Process of Law.

Plaintiff next contends that he was deprived of the right to due process of law in two respects: first, because the harassment policy left no discretion and required his suspension regardless of the circumstances of his case; and second, because the district never conducted a hearing to determine if he actually harassed anyone or had any intent to do so. For its part, the district argues that it provided T.W. with all the process that was due him under Kansas law and under the Constitution.

The Fourteenth Amendment to the Constitution provides in part that no state shall deprive any person of life, liberty, or property, without due process of law. U.S. Const. amend. XIV, § 1.The Supreme Court has held that students facing temporary suspension from public schools may have interests qualifying for protection under the Due Process Clause. The process that is due before a suspension may be imposed, however, is not the judicial model of a civil or criminal

trial. See Mathews v Eldridge, 424 U.S. 319, 348 (1976). In connection with a suspension of 10 days or less, due process requires that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. See Goss v Lopez, 419 U.S. 565, 581 (1975). There need be no delay between the time notice is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. Id. at 582. Goss merely said that in being given an opportunity to explain his version of the facts at this discussion, the student must first be told what he is accused of doing and what the basis of the accusation is. Id. These minimum constitutional requirements are essentially the same as the requirements of Kansas law, as set forth in K.S.A. § 72-8902.

The parties' facts show it is uncontroverted that when Mr. Keirns called T.W. into the office on April 15, 1998, Keirns orally advised T.W. that he was being charged with a violation of the racial harassment policy. Keirns then told T.W. the basis of that charge and gave T.W. an opportunity to present his side of the story, which T.W. did in writing. The court finds that this procedure was sufficient to meet the requirements of the due process clause and Kansas law. Accordingly, the district is entitled to judgment as a matter of law on plaintiffs' claim that he was denied property without due process of law.

C. Equal Protection claim.

The Equal Protection Clause of the Fourteenth Amendment provides in part that no state shall deny to any person within its jurisdiction the equal protection

of the laws. U.S. Const. amend XIV, § 1. Plaintiffs argue that the school district has violated T.W.'s right to equal protection because the racial harassment policy selectively punishes some students for possession of a Confederate flag based on their point of view, but does not punish students who possess the flag in history books and other materials that the school approves of.

Although the Supreme Court has occasionally "fused the First Amendment into the Equal Protection Clause" when addressing allegations like these of content-based restrictions on speech, see R.A.V. v. City of St. Paul. Minn., 505 U.S. 377, 385 n.4 (1987), such claims are more properly addressed under the First Amendment. Id. The inquiry into whether there is a legitimate government interest furthered by the restriction which is the focus of an equal protection claim is essentially an inquiry into whether the restriction violates the right of free speech under the First Amendment. Id. Accordingly, the court will consider this argument as part of plaintiffs' First Amendment challenge (on which the court denies summary judgment), but finds that the defendants are entitled to summary judgment insofar as plaintiffs seek relief for denial of the right to Equal Protection.

D. Ninth Amendment claim.

Plaintiffs next argue that the defendant's actions deprived T.W. of rights under the Ninth Amendment. Plaintiffs cite no authority for this claim, but argue that they should prevail under the Ninth Amendment if they prevail on any of their other claims.

The Ninth Amendment provides only that the enumeration of certain rights in the Constitution shall not be construed to deny or disparage others retained by the people. U.S. Const. amend. IX. Plaintiffs have

produced no evidence to show that the school district deprived T.W. of any federal right secured by this amendment. Cf. Strandberg v. City of Helena, 791 F.2d 744 (9th Cir. 1986) . Accordingly, the defendant is entitled to judgment as a matter of law on this claim.

E. Family Educational Rights and Privacy Act claim.

Plaintiffs' final claim is based on the Federal Educational Rights and Privacy Act, 20 U.S.C. § 1232g, or "FERPA." Plaintiffs contend that the News Release issued by the district on April 22, 1998, violated T.W.'s rights under the Act because the release disclosed confidential information by implying that T.W. had a disciplinary record.

Section 1232g provides in part that "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein...) of students without the written consent of their parents... ." 20 U.S.C. § 1232g(b) (1) . Subsection (e) of the statute provides that no federal funds shall be made available unless the educational institution informs the parents of students under eighteen years of age of the rights accorded to them by § 1232g. Subsection (f) , entitled "Enforcement; termination of assistance," provides in part that the Secretary of Education shall take appropriate action to enforce § 1232g and to deal with violations of the section. Subsection (g) directs the Secretary to establish an office and review board to investigate, review, and adjudicate violations of § 1232g and complaints of alleged violations.

The courts have unanimously held that § 1232g by itself does not provide a private cause of action. See

eg. Klein Indep. School Dist. v. Mattox, 830 F.2d 57 (5th Cir. 1987) . The courts are divided, however, on whether a parent or student can obtain a remedy under § 1983 for an alleged violation of § 1232g. See Gundlach v. Rothstein, 924 F.Supp. 684, 691-92 (E.D. Pa. 1996) (plaintiff cannot redress alleged violation of FERPA through § 1983) , aff'd, 114 F.3d 1172 (3rd Cir. 1997) (table); Norris v. Bd. of Educ. Greenwood Comm. School Corp., 797 F.Supp. 1452 (S.D. Ind. 1992) (same); Tarka v Cunningham, 917 F.2d 890 (5th Cir. 1990) (violation of FERPA requirements can be remedied through§ 1983) Fay v. South Colonie Cent. School Dist., 802 F.2d 21 (2nd Cir. 1986) (same) . Although there is considerable disagreement on this question, the court concludes that the particular statutory language and enforcement mechanism of FERPA show that the statute does not create enforceable rights within the meaning of § 1983. See Gundlach and Norris, supra.

Even if the court were to find that § 1983 gives the plaintiff a right to sue, and assumes that the school district's news release disclosed education records or personally identifiable information relating to T.W. (which is not altogether clear) , the plaintiffs still cannot prevail because they cite no evidence that the district had a "policy or practice" of releasing such records. The court notes that the school district has asked that all such records in this proceeding be kept under seal. As the court observed in Gundlach, supra, the term "policy or practice" in FERPA was adopted to address systematic, not individual, violations of student privacy rights. For all these reasons, plaintiffs' claim based on FERPA fails as a matter of law.

Conclusion.

The plaintiffs' motions for summary judgment (Doc. 27 & 40) are DENIED. Defendant's motion for

summary judgment (Doc. 44) is GRANTED with respect to plaintiffs' due process claim, Equal Protection claim, Ninth Amendment claim, and Family Educational Records and Privacy Act claim. Defendant's motion for summary judgment is DENIED with respect to plaintiffs' First Amendment claims. IT IS SO ORDERED this 27th day of July, 1998, at Wichita, Ks.

Wesley E. Brown, U.S. Senior District Judge

C1

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

JUDGMENT IN A CIVIL CASE

TERRY WEST, individually and as guardian of T.W., and T.W., a minor, Plaintiff(s) v. DERBY UNIFIED SCHOOL DISTRICT #260, Defendant(s)

Case Number: 98-1163-WEB

**Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED, pursuant to the Memorandum and Order (Doc. 58) filed and entered on the docket August 11, 1998, that the plaintiffs' motion for injunctive, declaratory and other relief is hereby denied and that the complaint is dismissed on the merits.

IT IS FURTHER ORDERED that judgment is entered in favor of the defendant school district.

ENTERED ON THE DOCKET: August 11, 1998

August 11, 1998 RALPH L. DeLOACH, Clerk
Date

C2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

TERRY WEST, individually and as guardian of T.W., and T.W., a minor, Plaintiffs, v. No. DERBY UNIFIED SCHOOL DISTRICT # 260, Defendant.

No. 98-1163-WEB

Memorandum and Order

Plaintiff T.W., a minor student attending the Derby Middle School, was suspended from school for three days after he drew a picture of a Confederate flag on a piece of paper during his math class. The defendant Derby Unified School District #260 suspended T.W. because it found he had violated the district's "Racial Harassment or Intimidation policy , which prohibits students from possessing at school "any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred," and which includes as examples of prohibited items "any item that denotes ... Confederate flags or articles. "On July 21, 1998, 'the court heard evidence on T.W.'s claim that the School District violated his First Amendment rights. Having heard the evidence presented, the court is now prepared to rule, and makes the following findings of fact, as shown by a preponderance of the evidence, and conclusions of law.

Plaintiff T.W. is a minor residing In Derby, Kansas. Plaintiff Terry West is T.W.'s father. During the 1997-98 academic year, T.W., was a seventh-grade student at the Derby Middle School. T.W. plans to be an eighth-grade student at the middle school in the 1998-99 school year. Defendant Derby Unified School District

#260, which is responsible for operating the Derby Middle School, is a school district of the State of Kansas located in Sedgwick County.

As Derby's population grew and became more diverse in the 1990's, the Derby School District experienced an increase in racial incidents involving students. The incidents occurred primarily at the Derby High School. In early 1995, there were several verbal confrontations at the high school between groups of white and black students. Although some of the confrontations were hostile and were viewed by administrators as potentially violent, apparently one of the confrontations at the school escalated to the point of fighting.

During 1995, some white students at the high school wore shirts bearing images of the Confederate battle flag. At the same time, some African-American students wore shirts with an "X" denoting support for the teachings of Malcolm X. In response, some white students wore shirts that stated, "You wear your X and I'll wear mine" with a Confederate flag representing the "X" on the back of the shirt. These types of displays provoked hostility between white and black students. A former Derby High School student, Stephanie Hart, described an incident she witnessed in 1995 in which a white student wearing a Confederate flag shirt said to a black student wearing a Malcolm X shirt, "Nice shirt, nigger." Ms. Hart testified that the Confederate flag came to be regarded by many students at Derby High as a symbol of racism.

In 1995, members of the "Aryan Nation" gathered just outside the entrance to the Derby High School and, in an attempt to solicit new members, passed out printed material to students as they left the school. The Ku Klux Klan also circulated printed materials off

campus that students brought to school to distribute. The materials were passed around school by some students. Examples or the views found in these materials include: "When a White person copulates with a non-white their children will be non-white. If this race mixing trend continues will only be a matter of time until America sinks into a monkey jungle of mixed races"; "Martin Luther King Jr.'s so-called dream has become a nightmare for the White Race and will continue to get worse and will eventually destroy the White Race. We believe that a total geographical separation and repatriation of all non-white races from America is the only solution...." ; and "As far as religion goes we believe the only thing jews worship is money, and power." Some of the materials contained images of the Confederate flag together with other symbols. Students advocating white supremacy distributed applications for membership to the White Knights of the Ku Klux Klan at the school and handed out KKK "business cards." One class at Derby High School was disrupted after a teacher confiscated some of this material from a student in the classroom.

Around this time, school officials at the Derby High School and Middle School began seeing racial graffiti in bathrooms and on walls saying "KKK" and "KKKK" (the latter standing for "Ku Klux Klan Killer"). Additionally, students spray painted walls or sidewalks at the high school football stadium, which is located on the middle school grounds, with such things as "KKK" and "Die nigger."

School officials received reports of racial incidents occurring on school buses used to transport students from all schools in the district. The Derby Middle School parking lot serves as a "bus terminal" where loads of students from all grade levels are brought to transfer to other buses to be transported to their schools.

School officials also received reports of racial episodes at Derby High School football games, including one incident where a fight broke out because a student wore a Confederate flag headband.

Brad Keirns, the Assistant principal of the Derby Middle School, testified at trial that he had seen instances of racial harassment in the middle school and that such incidents had a negative effect on minority students. Keirns said that some of the incidents involved the Confederate flag, including one where a student at school had a KKK or Aryan Nation card with a Confederate flag and other instances where students had drawn the Confederate flag on notebooks or on their arms. Keirns said that such incidents had heightened tension among students of different races and that the situation was potentially violent.

Although these incidents were not widespread and involved a relatively small number of students, there was significant concern among school officials and members of the Derby community in 1995 about the need to do something to address and to prevent racial problems of the type that were occurring in the district. February of 1995, Derby School District administrators sent a letter to all parents of Derby High School students inviting all interested citizens to attend a February 6, 1995, public meeting at the High School to discuss these problems. About 300 interested parents, students, citizens and community leaders attended the meeting. School officials compiled a list of concerns and solutions that were offered by focus groups at the meeting. The Derby School District then organized a 350-member task force to address racial issues in the district. That group, known as the Racial and Social Equity Task Force, issued its recommendations in June of 1995. One such

recommendation, which was subsequently adopted was that the Board of Education should develop a racial harassment policy modeled after the district's smoking and sexual harassment policies. The task force also recommended that a strong penalty be imposed for violation of the policy.

The Board of Education met in June of 1995 and adopted a new Racial Harassment or Intimidation Policy to be incorporated into all student handbooks for kindergarten through twelfth grade that read as follows:

RACIAL HARASSMENT OR INTIMIDATION

Student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs, wearing or possessing items depicting or implying racial hatred or orejudice. Students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive.)

Violations of this policy shall result in disciplinary action by school authorities. There will be a three day out-of-school

suspension for the first offense with a required parent conference prior to readmittance. The second offense will result in a three to five day out-of-school suspension with a possible expulsion hearing. The third offense will result in a suspension from school pending an expulsion hearing.

Any student who believes he or she has been subjected to racial harassment should discuss the problem with his/her principal, or another certified staff member. Initiation of a racial harassment complaint will not cause any adverse reflection of the student. The initiation of a student's complaint shall not adversely affect the job security or status of any employee or student until a finding of fact determines that improper conduct occurred. Strict confidentiality shall be maintained throughout the complaint procedure. (Policy subject to change based upon change in district policy.)

Although most of the racial problems in 1995 had occurred at the Derby High School, the district determined that the racial harassment policy should be applied at all levels, including the Derby Middle School. There were several reasons for this, including the fact that racial problems had occurred in and around the middle school, that middle school students frequently came into contact with high school students, that administrators and parents believed such a policy for younger students would help prevent racial problems before they started, that a uniform policy was desirable from the standpoint of fairness and would enhance

student understanding of the boundaries of appropriate behavior, and the ease and consistency of administration resulting from a single policy.

The Racial Harassment or Intimidation policy reflected the cumulative efforts and input of school administrators, the Racial and Social Equity Task Force, and the other individuals and groups that became involved at the invitation of the district.

The Office of Civil Rights ("OCR") of the United States Department of Education subsequently notified USD 260 that it would be conducting a review to determine if the district was complying with federal requirements that prohibit recipients of federal funds from discriminating on the basis of race, color, or national origin. The focus of the review was on whether its disciplinary policies and practices were administered in a nondiscriminatory manner and whether procedures were in place to prevent and remedy racial harassment. In June of 1996, the district agreed to adopt certain recommendations of OCR concerning discipline and the district's racial harassment policy.[1] One such recommendation was that the district reduce discretion in the administration of disciplinary sanctions. In December of 1997, the OCR

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1 Documents from the OCR indicate that the district modified its Racial Harassment or Intimidation policy in June of 1996 based upon recommendations by OCR. Def. Exh. W. It is unclear from the record what, if any, changes were in fact made to the original policy. This discrepancy is not particularly important, however, because the parties agree that the policy quoted above in the text was in effect at the time of the incident with T.W.

determined that no further action was required and that the district had fully implemented its agreement.

The policies and procedures implemented by USD 260 have been effective and have resulted in a marked decline of incidents of racial harassment or discord. Administrators of USD 260 believe that the racial harassment policy has helped to reduce racial tensions between students in the district. The number of referrals in the middle school dealing with racial problems in the last two years are significantly lower than the number observed in 1996.

All middle school students in the district were required to review Student Handbooks that set forth the policies of the school, including the Racial Harassment or Intimidation policy. In August of 1997, T.W. signed an acknowledgment form stating, "I have reviewed and understand the disciplinary policy at DMS as outlined in the DMS agenda book."

The Handbooks for the 1997-98 year also contained a "Parents' Page" with an acknowledgment form for parents stating, "I have read and discussed the parent/student handbook with my child. I understand that any questions I have should be addressed to Derby Middle School Administrators. I understand that the rules and procedures in this handbook are for the purpose of promoting and safe [sic] and orderly environment in which my child can learn and succeed." The form contains a space for a parent signature. At the top it indicates that the form should be removed from the book and returned to a teacher. Terry West, T.W.'s father, testified that he never looked at the Student Handbook prior to T.W.'s suspension for drawing a Confederate flag.

During the first couple of days of the 1997-98

schoōl year, teachers at the Derby Middle School reviewed the policies in the Student Handbook with the students. They read portions of the handbook to students, including the policy on Racial Harassment or Intimidation. T.W. was present when the policy was reviewed.

Prior to April of 1998, T.W. was involved in numerous prior disciplinary incidents during the 1997-98 school year.

On or about November 6, 1995, T.W. received a short-term suspension, from November 6 to November 8, 1995, for directing a racial slur ("blackie") to another student.

On or about February 13, 1998, T.W. received an administrative conference after another student accused him of saying, "What's up, nigger?" to him. The other student was white. T.W. denied making the statement, and school officials were unable to find witnesses to this statement. T.W. received an administrative conference with Derby Middle School Assistant Principal Brad Keirns, who reviewed the Racial Harassment or Intimidation policy with T.W., including the examples of items prohibited by the policy such as Confederate flags.

On April 14, 1998, T.W. was present in his mathematics class at Derby Middle School. He was seated at his desk, which was grouped together with the desks of three other students, when he and one of the other students in the group, D.H., began talking about the "Rebel Flag." T.W. knew how to draw the Confederate flag because he had previously seen it on car license plate holders, on a flag at the "Four Flags Trading Post" in Wichita, on the television show "Dukes of Hazzard," and on a race car he had seen at the "81

Speedway" race track.

It is undisputed that after some discussion between the students, T.W. drew a picture of a Confederate flag on the back of a piece of paper and that D.H. gave the drawing to Mr. Koehn, the boys' math teacher, and told him that T.W. had drawn it. After Mr. Koehn saw the drawing, he instructed T.W. to sit out in the hallway. T.W. sat in the hall for approximately twenty minutes until the period ended. When class ended, and because math was his last class of the day, T.W. collected his belongings from his locker and left the school. The next morning, April 15, 1998, Mr. Koehn gave the Confederate flag drawing to Assistant Principal Brad Keirns and told him that T. W. had drawn the picture the previous day in math class. T.W. arrived late to school on April 15 and proceeded to the office to sign in. He was told that Mr. Keirns wanted to see him in his office.

Mr. Keirns has been the 7th Grade Assistant Principal at Derby Middle School for four years. He is responsible for meting out discipline to 7th graders and for enforcing the district's policies governing student behavior.

When T.W. went to Mr. Keirns' office on April 15, 1998, Keirns showed him the picture of the Confederate flag and asked T.W. if he recognized it. T.W. said yes and acknowledged that he had drawn a picture. Keirns then reviewed the Racial Harassment or Intimidation policy with T.W. and asked him if he understood that under the policy he was not supposed to possess a Confederate flag. T.W. said yes and acknowledged that he knew he had drawn a Confederate flag. Keirns indicated that he believed T.W. had violated the Racial Harassment policy, and he asked T.W. if he wanted to write a statement setting forth his version of the

incident. T.W. initially declined, but did write a statement after Keirns again asked him to do so.

Mr. Keirns initially obtained written statements from two or the students who had been sitting in math class with T.W.[2] Both of these students indicated in written statements that T.W. was warned by them before he drew the flag that he would get in trouble for doing so. One of them wrote that all three students around T.W. warned him that he would get suspended for drawing the rebel flag and that T.W. "said he didn't care and drew it anyway."

Based on the information he had gathered, Mr. Keirns concluded that T.W. had violated the Racial Harassment or Intimidation policy and that a three day suspension was warranted. Mr. Keirns was firmly convinced that T.W. knew that what he was doing was wrong and that he had intentionally violated the racial harassment policy. At the same time, Keirns did not believe, and there was no evidence to suggest, that T.W. planned to use the flag to harass or intimidate anyone. According to Mr. Keirns, the factors that went into his decision to suspend T.W. were that T.W. admitted to making the drawing, that other students saw the drawing, that other students had warned T.W. not to make the drawing, and that Mr. Keirns had reviewed the Racial Harassment or Intimidation policy with T.W. following a previous incident.

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2 Mr. Keirns subsequently obtained the written statement of the third student who had witnessed the incident. The statement of that student corroborated Mr. Keirns's prior conclusion that T.W. knew he was violating the policy.

Contrary to plaintiff's suggestion that he did nothing more than possess the drawing of the Confederate flag, the court finds that T.W. drew the flag with an intention of displaying it to another student, and that he in fact did so. The court further finds it likely that at least three of the students around T.W. in his math class saw the drawing.

Keirns called Terry West on the telephone and informed him that T.W. was suspended for drawing a Confederate flag in school. Mr. West expressed disbelief to Mr. Keirns and specifically asked if T.W. had used the drawing to harass or intimidate any other student. Mr. Keirns stated that T.W. had not.

The day that T.W. was suspended, Terry West contacted the newspaper about the incident.

T.W. testified at trial as to the circumstances surrounding his drawing of the flag. To put it charitably, the court finds that T.W. demonstrated a "convenient memory" when he recounted those events. T.W. attempted -- as some adolescents in such a situation are inclined to do -- to minimize any evidence that he knew his actions were wrong. He claimed that he hadn't read the Student Handbook before the incident, despite the fact that he had signed an acknowledgement form stating that he had. He professed little recollection of Mr. Keirns having reviewed the racial harassment policy with him after the February 1998 incident, conceding only that Keirns "might have" done so. He suggested that he was only vaguely aware of the prohibition on possession of items denoting Confederate flags, despite the fact that school officials had reviewed the policy with him on more than one occasion. He conceded that he initially refused to draw the flag when D.H. first asked him to, but asserted that this was because he was trying to do the

assignment and not because he thought he would get in trouble. And, although he conceded that the three students around him had no reason to lie about him, he said that he did not hear any of them warn him that he would get in trouble if he drew the flag. He further denied having said "I don't care" in response to one of the student's warnings that he would get suspended.

As was stated above, Mr. Keirns concluded that T.W. intentionally violated the racial harassment policy when he drew the Confederate flag. That finding is amply supported by the evidence. The Racial Harassment policy had been read to T.W. on more than one occasion, including a one-on-one session with Mr. Keirns. The written statements of the other students who witnessed the incident make clear that T.W. was warned before he drew the flag that he would get suspended for it. Those statements also make clear that T.W. drew the flag with a willful purpose to disobey or to disregard the rule prohibiting such a drawing. The evidence suggests that T.W. initially refused to draw the flac because he knew he could get in trouble, that he was well aware that such a drawing could be considered improper under the school's policy, that he was warned by more than one student around him that he would get suspended if he drew the flag, that he responded by saying "I don't care," and that when D.H. began walking to the teacher to show him the drawing, T.W. said "come back" because he knew he would get in trouble. The intimation that T.W, acted innocently and without any improper purpose is contrary to the evidence. While T.W. may not have intended to harass anyone by drawing the Confederate flag, it is clear to the court that he knowingly and intentionally violated the policy against possession of such symbols at school.

The plaintiff suggests that the court should not consider as evidence the written statements of the

other students who witnessed the incident because those statements were not given under oath and because the students were not called as witnesses at trial. The court rejects this argument. As an initial matter, the court finds it was entirely appropriate for Mr. Keirns to have relied on such statements in support of his decision to suspend T.W. School administrators "are entitled to rely on traditional sources for the factual information on which they decide and act." Wood v. Strickland, 420 U. S. 308, 319 (1975) . In such circumstances an administrator has "an obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others." Id. Given the factual basis Mr. Keirns had to support his decision, he was entitled to rely on such statements, and the court has no basis in this action to question such reliance. Cf. Wood, 420 U.S. at 326 ( § 1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings) . Moreover, the court concludes that such statements are admissible and are properly considered under one of the numerous exceptions to the rule against hearsay. See e.g., Fed.R.Evid. 803(6) & (8), 807.

Mr. Keirns presented T.W. with a written Notification or Short-Term Suspension on the morning of April 15th which included the basis for and the length of the suspension. T.W. signed the document in Mr. Keirns' presence.

Melva Owens was the Superintendent of USD 260 when the district adopted its Racial Harassment or Intimidation policy. She testified at trial about the circumstances that led to adoption of the policy and she gave her understanding of how the policy is supposed to be applied. According to Ms. Owens, the policy permits an administrator to consider a number of factors in determining whether a violation has occurred, including

the student's state of mind at the time (whether intentional or innocent) and whether the incident promotes hatred. Brad Keirns also testified that the circumstances surrounding each incident are considered in determining whether a violation of the Racial Harassment or Intimidation policy has occurred. He said that he is expected to use common sense in applying the policy. For example, he said, students are not punished for possessing books containing pictures of Confederate flags. Keirns suggested that students would not be punished for possession of Confederate flag images in connection with any legitimate educational purposes, noting that a student who had previously included swastikas on a model project relating to study of the Holocaust did not violate the policy. According to Keirns, a student's intent is considered in deciding whether a violation has occurred, and if it is determined that a student did not mean to do anything wrong, that student would not be punished.

The district requires all 3th Grade students to possess as part of the history curriculum a book entitled, "The American Journey," which depicts the Confederate flag on several pages. Also, library books that contain decictions of the Confederate flag are made available to students at the Middle School. Students are not punished for having these materials in their possession.

In the summer of 1998, the district hosted a national student conference at Derby High School. As part of that conference, the district displayed the state flags of all fifty states, including those of Mississippi and Georgia, whose flags include depictions of the Confederate flag.

Terry West testified that various kids have called T. W. a racist because of what happened and that some

kids physically confronted T.W. on one occasion. Mr. Keirns testified that the district had some concerns for T.W.'s safety after the flag incident. He testified that three students were upset that T.W. drew the flag, and Keirns called these students in and talked to them.

Dr. Dennis Shoemaker, the current Superintendent of USD #260, believes that the Racial Harassment or Intimidation policy has been effective in reducing racial tension among students in the district. He is concerned about problems that would result if the prohibition on possession of Confederate flag images were to be voided. He believes that the Confederate flag is widely regarded in the district as a symbol of racial prejudice and believes there would be retaliation if some students were permitted to display it at school.

II.

The First Amendment to the United States Constitution provides in part that "Congress shall make no law ... abridging the freedom of speech, . . ." The amendment applies to the States by virtue of the Fourteenth Amendment. See e.g., Board of Ed. Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 855, n. 1 (1982) As an agency of the State of Kansas, Derby USD 260 is subject to the limitations of the First Amendment.

The First Amendment guarantees wide freedom in matters of adult public discourse. Bethel School District No. 404 v Fraser, 478 U.S. 682 (1986) . It does not follow, however, that the same latitude must be permitted to children in a public school. Id. The Supreme Court has recognized on several occasions that the constitutional rights of students in public schools are not automatically coextensive with the rights of

adults in other settings. Id. (citing New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985)).

Two Supreme Court cases in particular address this qualification. In Tinker v. Des Moines Indep. Comm. School Dist., 393 U.S. 503 (1969), the Supreme Court found that a school violated the free speech rights of students by suspending them for wearing black armbands to school to protest the Vietnam war. Although the school argued that it feared the students' actions would cause a disruption, the Supreme Court said that this was an "undifferentiated fear," and that the prohibition could not be sustained absent a showing that the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the school." Id. at 509. Moreover, the court noted, the school did not prohibit the wearing of other political symbols, and an attempt to single out and suppress one particular opinion was not constitutionally permissible. Id. at 511. On the other hand, the Court said, conduct by a student which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is not immunized by the constitutional guarantee of freedom of speech. Id. at 513. More recently, in Bethel School Dist. No. 403 v. Fraser, 479 U.S. 675 (1986), the Court upheld a public high school's suspension of a student for giving a speech containing sexual innuendo at a school assembly. In doing so the Court found that the fundamental role of public schools in preparing students for citizenship in a democracy included teaching students the "habits and manners of civility," id. at 681, and explained:

> These fundamental values of "habits and manners of civility" essential

> to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Id. at 681. In finding that the school could punish the student for using offensive language, the Court said that "[n]othing in the Constitution prohibits the states from insisting that certain modes of expression (in public schools) are inappropriate and subject to sanctions." Id. at 683. Moreover, "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." Id. "The First Amendment," the Court concluded, "does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." Id. at 685.

With this background in mind, the court turns to the Derby School District's policy that prohibits students from possessing "written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred," and which includes

by way of example "clothing, articles, material, publications or any item that denotes ... Confederate flags or articles." The court concludes that, unlike the Tinker case, school officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images, when unconnected with any legitimate educational purpose, would likely lead to a material and substantial disruption of school discipline. The district experienced a series of racial incidents or confrontations in 1995, some of which were related to display of the Confederate flag. The incidents included a hostile confrontation between a group of white and black students at school and at least one fight at a high school football game. Cf. Tinker, 393 U.S. at 508 (this case "does not concern aggressive, disruptive action or even group demonstration."). The Racial Harassment policy enacted in response to this situation was clearly "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." See id., 393 U.S. at 509. The history of racial tension in the district made administrators and parents' concerns about future substantial disruptions from possession of Confederate flag symbols at school reasonable. The fact that a full-fledged brawl had not yet broken out over the Confederate flag does not mean that the district was required to sit and wait for one. "If there are substantial facts which reasonably support a forecast of likely disruption, the judgment of the school authorities in denying permission and in exercising restraint will normally be sustained." Phillips v.Anderson County School Dist. Five, 987 F.Supp. 488, 492 (D. S.C. 1997) . In this case, the district had a reasonable basis for forecasting disruption from display of such items at school, and its prohibition was therefore permissible under the Tinker standard. The fact that T.W.'s conduct may not have resulted in an actual disruption of the classroom on April 14, 1998,

does not mean that the school had no authority to act. See Phillips, 987 F.Supp. at 493 ("One day free of conflict does not eliminate the school's significant history of problems caused by the Confederate Flag. Nor does it support a conclusion that the Confederate Flag would no longer cause disruptions at [the school] or that [the school] should have waited until the Confederate Flag caused yet another disruption..."). The district had the power to act to prevent problems before they occurred; it was not limited to prohibiting and punishing conduct only after it caused a disturbance.

In connection with the above finding, the court makes a brief comment on the nature of the Confederate flag. Plaintiff correctly points out that this flag is vilified by some, but honored by others. The court does not mean to suggest in this opinion that anyone who displays this flag is a racist or that they necessarily do so to express any particular viewpoint on race. Moreover, outside of the school context, it is certainly the right of any American to display any symbol they wish, and it is not the place of this court to approve or disapprove of such behavior. But the court can and will say that in the context of this case, the school district had a reasonable basis for concluding that the Confederate flag is a symbol that "is racially divisive or creates ill will or hatred." One of the most unfortunate aspects of this case is T.W.'s explanation after he drew the flag that he "didn't know what it ment [sic] ." Whether he knew it or not, it is a fact that the Confederate flag was adopted by those in America whose purpose was to preserve a system that permitted the enslavement of African-Americans. To many who are aware of the immeasurable human suffering that resulted from slavery and the Civil War, displaying this flag today represents an expression of continuing contempt for the rights of African-Americans to participate fully and equally in American society. It is

certainly possible to display the Confederate flag without any such thought in mind, and there is no evidence that T.W. intended to make such a statement or, indeed, that he intended to express any particular viewpoint at all. But given the Confederate flag's history, as well as the history of racial incidents in the Derby School District, it was reasonable for the district to consider this flag as a symbol whose display at school would likely lead to a disruption. In this regard, it should be noted that other courts have also held that the First Amendment does not prevent schools that have experienced disruptive racial problems from prohibiting the display of Confederate flag symbols. See Melton v. Young, 465 F.2d 1332 (6th Cir. 1972), cert. denied, 411 U.S. 951; Phillips v. Anderson County School Dist. Five, 987 F.Supp. 488 (D. S.C. 1997); and Denno v. School Board of Volusia County, 959 F.Supp. 1481 (M.D. Fla. 1997) (school official was immune from damages for suspending student who wore Confederate flag symbol) . Cf. "The Banning of Confederate Symbols in the Public Schools," 125 Ed. Law Rep. 1019 (West 1998).

The court also finds that the school district's policy is supported by the reasoning of Bethel School District. The "habits and manners of civility" which the Supreme Court said are essential to a democratic society "must take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." Bethel School Dist., 478 U.S. at 682. Part of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms rather than in "terms of debate highly offensive

or highly threatening to others." See Id. at 683. There is no evidence that the school district has attempted to suppress civil debate on racial matters, but the district has concluded that the display of certain symbols that have become associated with racial prejudice are so likely to provoke feelings of hatred and ill will in others that they are inappropriate in the school context. There is evidence in the district's recent past to support such a view, and the court concludes that the district's prohibition of those symbols and its insistence upon more civil terms of debate is within its lawful authority. Cf. Bethel, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate rests with the school board.")

III.

Aside from arguing that the district's Racial Harassment or Intimidation policy fails under the standards of Tinker and Bethel, plaintiff also argues that the policy is unconstitutionally overbroad on its face. An overbroad statute is one that is designed to punish activities that are not constitutionally protected, but which prohibits protected activities as well.[3]

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3 In the First Amendment area, the Supreme Court has permitted challenges on overly broad statutes with no requirement that the person making the challenge show that his own conduct could not be regulated by a more narrowly drawn statute. Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). Litigants have thus been permitted to challenge a statute not because their own rights have been violated, but because an overly broad statute may cause others not before the court to refrain from constitutionally protected speech or expression. Id.

Plaintiff argues that the policy is overbroad because it penalizes students for engaging in speech or expression that does not materially interfere with school discipline, because it punishes them for possessing symbols even if the student does not intend to harass anyone and even if no one is harassed, and because the list of prohibited symbols in the policy is "not intended to be all inclusive."

Only a statute that is substantially overbroad may be invalidated on its face. City of Houston v. Hill, 482 U.S. 451, 458 (1987) . The Supreme Court has never held that a statute should be invalidated merely because it is possible to conceive of a single impermissible application. Id. Instead, in a facial challenge to the overbreadth and vagueness of a law, the court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Id.

In discerning the reach of the policy, the court must consider any limiting constructions placed on the policy by the defendant. See Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989) ("Administrative interpretation and implementation of a regulation are ... highly relevant to" whether the regulation is overbroad.) In this regard, the court notes that the district has asserted that administrators are entitled to consider "common sense" in enforcing the policy, and that Mr. Keirns' testimony shows he considered certain factors not listed in the policy in determining that T.W. should be suspended. For example, he relied on the fact that T.W. intentionally violated the policy, that T.W. displayed the Confederate flag drawing to another student, that other students saw the drawing, an d that

other students had warned T.W. not to draw the flag. Mr. Keirns' testimony also made clear that possessing depictions of the Confederate flag for legitimate educational purposes, such as in history or library books, is not considered by the school to be a violation of the policy and that no student has ever been disciplined for such conduct.

Absent the limitations recognized by Mr. Keirns, the district policy would likely be overbroad because it could be interpreted to prohibit possession of history books and to punish innocent conduct in circumstances where there is no threat of disruption. As it has been actually applied by school administrators, however, the policy permits the administrator to consider whether the student's conduct was wiliful[4], whether the student displayed the symbol in some manner, and whether the conduct had the effect of creating ill will, and the district does not interpret the policy to prohibit the use or possession of such symbols for legitimate educational purposes. These limitations make it likely that the policy will only apply in circumstances where it is constitutional to do so under Tinker and Bethel. In light of the actual construction given the policy by school administrators, the court concludes that the policy does not reach a substantial amount of protected conduct and is not unconstitutionally overbroad. The evidence does not show a substantial danger that the policy will significantly compromise the First Amendment rights of other students.

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4 "Willful" means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.

Plaintiff also argues that the Racial Harassment or Intimidation policy must be declared void because it is unconstitutionally vague. Under the "void for vagueness doctrine," a governmental regulation may be declared void if it fails to give a person adequate warning that his conduct is prohibited or if it fails to set out adequate standards to prevent arbitrary and discriminatory enforcement. See Kolender v. Lawson, 461 U.S. 352, 357 (1983).

The court concludes that the Racial Harassment or Intimidation policy is not unconstitutionally vague.[5] Insofar as plaintiff is arguing that the policy was too vague for him to understand, the evidence shows that T.W. knew he was violating the policy when he drew the flag. Such a state of mind is inconsistent with any claim that the policy did not give plaintiff fair warning that his conduct was prohibited. Cf. Screws v. United States, 325 U.S. 91,101-102 (1945) (plurality opinion) ("The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.") Insofar as plaintiff's facial challenge based on vagueness is concerned, the court again finds that in light of the actual construction of the policy given by school administrators -- including

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5 Although the court previously indicated in its summary judgment ruling that only the First Amendment claims would be heard at trial, it did not mean to exclude plaintiff's vagueness challenge, which arises in part under the Due Process Clause if Fourteenth Amendment. See Connally v. General Const. Co., 269 U.S. 385, 391 (1926) (the void for vagueness doctrine finds its basis in the guarantee of due process).

the requirement that the student's conduct be willful and the exception for legitimate educational purposes -- the policy gives students sufficient warning of what is prohibited and provides a sufficient guide for enforcement. As the Supreme Court noted in Bethel School District:

> We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." cite omitted] Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.

Id. 478 U.S. at 686. Although the flexible policy and enforcement procedure used by the school district in this case would surely be unconstitutional in the context of a criminal proceeding, the court concludes that it falls within the range of authority given to administrators to control student conduct in the public schools. In sum, the court finds that the policy gives students fair notice of what conduct is prohibited and is not unconstitutionally vague.

Plaintiff's final argument is that the Racial Harassment policy is unconstitutional because the district permits students to possess Confederate flag symbols in some circumstances but not in others. Plaintiff believes this is an impermissible prohibition on the content of expression and that it singles out and

attempts to suppress one particular viewpoint. (Citing R.A.V. v. City of St.Paul, 505 U.S. 377 (1992) and Texas v. Johnson, 491 U.S. 397 (1989)). Clearly, a prohibition of the type involved in this case would be intolerable if applied to adults in other settings. But this case involves middle school students in public school district with a recent history of racial disturbances. Where, as here, the evidence shows that the prohibition is justified under Tinker and Bethel School District, the Supreme Court has made clear that the First Amendment does not prevent a public school from prohibiting certain types of speech that would otherwise be protected. That is the case here. Contrary to being an impermissible classification, the district's distinction between appropriate uses of the Confederate flag and uses that are likely to lead to a disruption is a narrowing construction that ensures that the policy is consistent with the requirements of Tinker. Moreover, the court notes that the district has not singled out Confederate flags, but prohibits a number of items that may lead to a disturbance as well, such as "Black Power" and "Neo-Nazi" symbols. In sum, the court finds that the district's prohibition does not violate the First Amendment.

IV.

The evidence presented to the court shows that the school district's Racial Harassment or Intimidation policy was adopted to prevent racial disturbances of the type that occurred in 1995, and that the school district acted within its constitutional authority in enacting such a policy. Plaintiff has failed to show that the school district's adoption and application of this policy violated his First Amendment rights. He has also failed to show a likelihood that the district will violate the First Amendment rights of other students in its application of the policy.

Under the evidence presented, this case is not about the fundamental right to freedom of speech, but is instead a question of the appropriate discipline for a student's willful violation of a school policy. As such, it fell within the authority of school administrators to take such action as they concluded was necessary to maintain discipline in the school. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." New Jersey v. T.L.O., 469 U.S. 325, 350 (1935)(Powell, J., concurring).

The federal judicial power may be invoked when a student has been deprived of his constitutional rights by a public official. But the federal courts do not sit to supervise or to second guess the day-to-day decisions of school administrators in operating the public schools. To the contrary, the Supreme Court "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." Tinker, 393 U.S. at 507. "[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

V.

In accordance with the foregoing findings and the previous rulings of the court, plaintiffs' motion for injunctive, declaratory and other relief is hereby DENIED and the complaint is DISMISSED on the merits. The clerk is directed to enter judgment in favor of the defendant school district. IT IS SO ORDERED this 11 day of August, 1998, at Wichita, Kansas.

Wesley E. Brown, U.S. District Senior Judge

# A HANDBOOK FOR STUDENTS AND PARENTS

DERBY MIDDLE SCHOOL
801 E. Madison
Derby, Kansas 67037

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[Non-pertinent portion omitted]

Derby Middle School Mission

Our mission is effective teaching and successful learning for all of our students in a supportive community.

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[Non-pertinent portion omitted]

## NONDISCRIMINATION STATEMENT

The Derby Unified School District #260 does not discriminate on the basis of race, religion, color, national origin, gender, age, or disability in admission or access to. or treatment or employment in its programs and activities any person having inquiries concerning the Derby School District's compliance with the regulations implementing Title VI Title IX, Americans with Disability Act or Section 504 is directed to contact

Michael Redburn,
Assistant Superintendent for Human Resources
120 E Washington, Derby, Kansas 67037
or at (316) 788-8415

This district official has been designated by the Derby School District to coordinate the district's efforts to comply with the regulations implementing these laws.

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(Non-pertinent portion omitted)

## SAFE SCHOOLS ACT

The Kansas School Safety and Security Act (K.S.A.72-89b03) requires school personnel to report all felony and misdemeanor crimes committed on school property or at a school supervised activity to the appropriate law enforcement agency. If an administrator's preliminary investigation reveals information which indicates a crime (felony or misdemeanor) may have been committed, the administrator is required to file a report. Whether or not the report is made in writing (for later follow-up by law enforcement) or by phone (for immediate follow-up by law enforcement) is dependent upon the seriousness and nature of the situation. When law enforcement officers conduct an investigation and/or question a student(s) during school hours, the building administration shall make reasonable attempts to contact parents, guardians or representatives of the student(s) prior to questioning. To the extent possible, reasonable request of parents, guardians or representatives shall be observed. Notification or attempted notification of parents, guardians or representatives shall be documented by the administrator involved. If a student's parents, guardian or representative is not present during questioning of a student, the principal or a certified school staff member shall be present. The decision to arrest a student and remove that student from the school jurisdiction is the prerogative of law enforcement and not under the authority of school personnel.

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(Non-pertinent portion omitted)

## RACIAL HARASSMENT OR INTIMIDATION

District employees and student(s) shall not racially harass or intimidate another student(s) by name calling, using racial or derogatory slurs, wearing or possession of items depicting or implying racial hatred or prejudice. District employees and students shall not at school, on school property or at school activities wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred. (Examples: clothing, articles, material, publications or any item that denotes Ku Klux Klan, Aryan Nation-White Supremacy, Black Power, Confederate flags or articles, Neo-Nazi or any other "hate" group. This list is not intended to be all inclusive).

Violations of this policy shall result in disciplinary action by school authorities. For students there will be a three day out-of-school suspension for the first offense with a required parent conference prior to readmittance. The second offense will result in a three to five day out-of-school suspension with a possible expulsion hearing. The third offense will result in a suspension from school pending an expulsion hearing. Employees who violate this policy will be dealt with in accordance with applicable district policy and procedures.

Any student who believes he or she has been subjected to racial harassment should discuss the problem with his/ her principal, or another certified staff member. Staff members shall refer all complaints of racial harassment or intimidation to a building administrator. Complaints regarding racial harassment or

intimidation shall be investigated under the district's discrimination complaint procedure identified in policy KN which provides for immediate investigation and disciplinary action where appropriate. Initiation of a racial harassment complaint will not cause any adverse reflection of the student. The initiation of a students complaint shall not adversely affect the job security or status of any employee or student until a finding of fact determines that improper conduct occurred. Strict confidentiality shall be maintained throughout the complaint procedure. (Policy subject to change based upon change in district policy.)

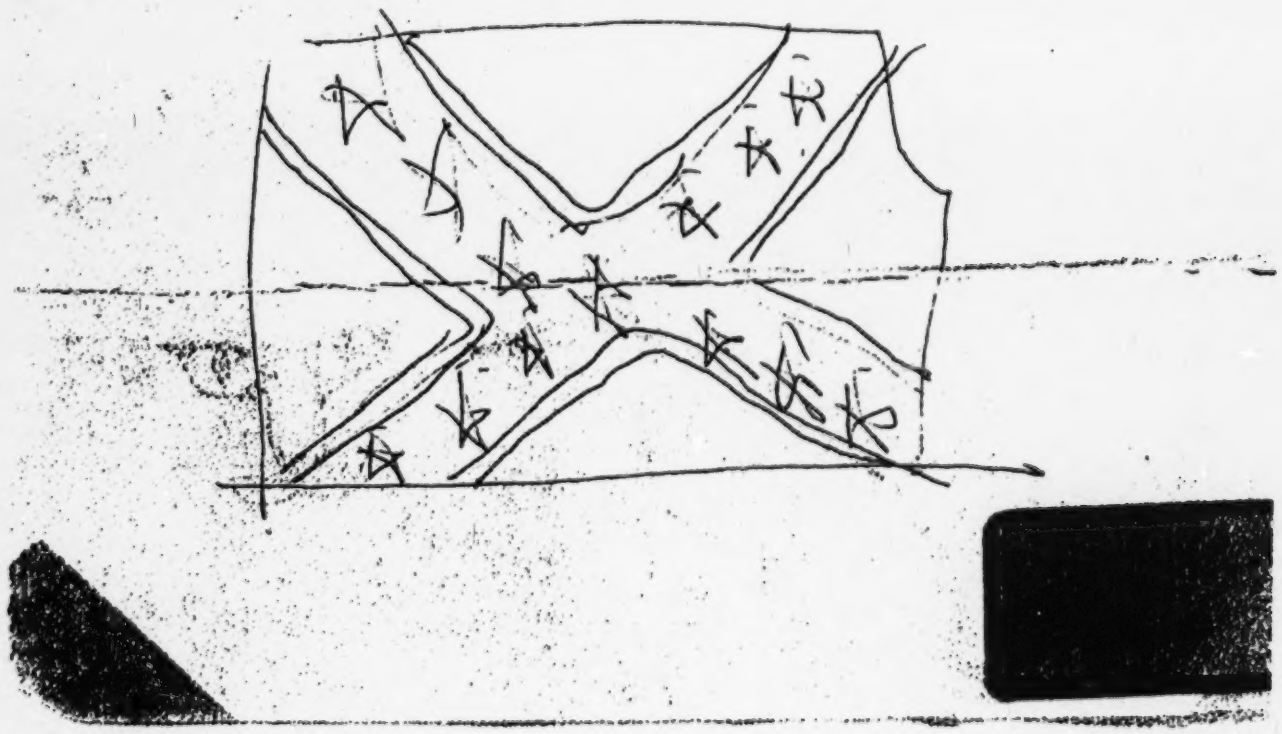
****

(Non-pertinent portion omitted)

FRONT

# Thank You Gram

BACK



BEST AVAILABLE COPY

Derby
Unified School District 260

APPENDIX F

F-1

## NOTIFICATION OF SHORT-TERM SUSPENSION

4/15/98 — DATE
T.J. West — STUDENT'S NAME
7 — GRADE

This is to inform you that your ~~son~~/daughter T.J. has been suspended from Derby Middle School for 3 days. This is effective 4/16 through 4/20 due to:
Racial Harassment / Intimidation

Before the student was suspended, an informal hearing had been provided the student, if possible, by the administrator handling the case.

The student may return to school on 4/21.

X Notification by telephone (date) Dad - 9:40 - 4/15/98

____ Unable to contact

____ Parent conference required prior to student's return

____ Contact office for appointment at _____

____ Notification sent by regular and/or certified restricted mail (date) _____

A copy of KSA 72-8901 or 72-8906 -- a law relating to public schools, suspension and expulsion of students, and procedures is attached to this letter, and explains the student's rights under 72-8903 of said act. A copy of the relevant USD #260 policy is also attached to this letter.

Your son/daughter is not allowed on USD #260 school property during this suspension.

Thank you for your cooperation. If you have any further questions regarding this matter, please contact me.

Administrator's signature: _____ Date: 4/15/98

Students' signature: T.J. West Date: 4/15-98

cc: student file

-ATTACHMENTS-

SHTERM.WPD

FORM: 252

Supreme Court, U.S.
FILED
AUG - 3 2000
CLERK

(2)

No. 99-2039

In The

# Supreme Court of the United States

TERRY WEST, INDIVIDUALLY AND AS GUARDIAN OF A MINOR, T.W., AND T.W., A MINOR,

*Petitioners,*

v.

DERBY UNIFIED SCHOOL DISTRICT NO. 260,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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2094

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... ii

STATEMENT OF CASE ..... 1

REASONS FOR DENYING THE WRIT ..... 2

I. THE DECISION OF THE COURT OF APPEALS FOLLOWS PRIOR SUPREME COURT RULINGS INCLUDING *TINKER V. DES MOINES*..... 2

II. THE POLICY IS NOT OVERBROAD..... 10

III. THE LIMITING CONSTRUCTION DOES NOT MAKE THE POLICY VAGUE..... 12

IV. THE TENTH CIRCUIT FOLLOWED SUPREME COURT PRECEDENT IN ITS TREATMENT OF PETITIONERS' EQUAL PROTECTION COUNT ..... 13

V. THE TENTH CIRCUIT FOLLOWED ESTABLISHED DUE PROCESS PRINCIPLES..... 15

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

Page

CASES

*Baggett v. Bullitt*, 377 U.S. 360 (1964) ..... 12

*Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) ..... 5, 11

*Broadrick v. Oklahoma*, 413 U.S. 601 (1973) ..... 10, 12

*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) ..... 14

*Denno v. School Bd. Of Volusia County, Fla.*, 2000 WL 1005058 (11th Cir. 2000) ..... 9

*Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 258 (1988) ..... 5, 15

*Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972) ..... 6, 7

*Members of City Council v. Tax Payers for Vincent*, 466 U.S. 789 (1984) ..... 10

*Phillips v. Anderson Co. School District Five*, 987 F. Supp. 488 (D. S.C. 1997) ..... 7, 8, 9

*Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) ..... 15

*New Jersey v. T.L.O.*, 469 U.S. 325 (1935) ..... 17

*Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) ..... 3, 4, 5, 6, 9, 10

*Ward v. Rock Against Racism*, 491 U.S. 781 (1989) ..... 11

## STATEMENT OF CASE

The facts are substantially as presented in the petition with the exception that petitioners underreport the severity of the racial unrest the school district's policy was intended to address. Numerous potentially violent encounters occurred in the district prior to the creation of the district's policy. White supremacist students wore shirts bearing the image of the Confederate flag. African-American students responded by wearing shirts bearing an "X" denoting support for the teachings of Malcolm X. White students countered wearing shirts that stated "You wear your X and I'll wear mine" (with a Confederate flag shown to represent the X on the back of a shirt). A Derby High School student witnessed a verbal encounter during which a white student, wearing the Confederate flag shirt, said to an African-American student wearing a Malcolm X shirt, "Nice shirt, nigger" and "Fucking nigger."

The Aryan Nation hosted an event directly across the street from the Derby High School to solicit members. The Ku Klux Klan and Aryan Nation passed out literature and pamphlets off campus that students brought to school to distribute. The literature relating to KKK philosophies bore the Confederate flag insignia.

There was also evidence of racial tension at the Derby Middle School. Spray painted graffiti appeared on the walls at the Derby High School football stadium which is located on the grounds of the Derby Middle School. Graffiti also appeared in the bathrooms at the middle school. This graffiti included phrases such as "Die Nigger," "KKK" and "White Power." There was also

graffiti which included "KKKK," the fourth K standing for killer, which was intended to mean "Kill the KKK."

On at least one occasion, actual violence did erupt, when a fight broke out at a high school football game as a result of a student wearing a headband bearing the image of a Confederate flag.

School officials, parents and the Derby community thought the racial problems developing in Derby schools were so severe they formed a 350-member task force to address the hostile and potentially violent atmosphere that existed in the district. The task force worked on these issues for four months and ultimately recommended the adoption of the "Racial Harassment or Intimidation Policy" which is the subject of this action.

## REASONS FOR DENYING THE WRIT

### I. THE DECISION OF THE COURT OF APPEALS FOLLOWS PRIOR SUPREME COURT RULINGS INCLUDING *TINKER V. DES MOINES*.

Petitioners attempt to cloud their First Amendment argument by claiming the Tenth Circuit's decision impermissibly limits the holding in Tinker. The petitioners assert that language adopted by the Tenth Circuit imposes a requirement that students have a "legitimate educational purpose" in order to possess controversial symbols at school. This is simply a misstatement of the Court's holding. School officials and the District Court recognize the Confederate flag as a legitimate and valuable part of American history. As such, the Confederate

flag has a place in students' text books and other educational tools. However, as evidenced by the events in Derby schools, when students display the Confederate flag outside the school curriculum there is a real threat of violence. "School officials in Derby had evidence from which they could reasonably conclude that possession and display of Confederate flag images when unconnected with any legitimate educational purpose would likely lead to a material and substantial disruption of school discipline." *West v. Derby Unified School District No. 260*, 206 F.3d 1358, 1366 (2000) (*quoting West v. Derby Unified School District No. 260*, 23 F.Supp.2d 1231-34 (1999)). This language reflects nothing more than the Court's acknowledgment of the dual role the Confederate flag plays in American society as both a symbol of our history and a symbol of racial hatred and divisiveness. The Court was merely placing a limitation on the policy to preserve use of the flag for educational purposes.

Petitioners continue to insist on analogizing the facts of the present case to those in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). This is incorrect. In *Tinker*, a small group of students were suspended for wearing black armbands in a peaceful protest after school officials banned black arm bands fearing a possible violent reaction. In this case, the Confederate flag did not only have the potential to cause a violent reaction, but had been the focus of prior racial unrest in the Derby school district which had severely disrupted the school. As stated above, the existence of a dangerous climate of racial tension is well documented. This is a dramatically different situation than was present in *Tinker*.

*Tinker* did not confer absolute freedom of speech on students in public schools. Justice Stewart explained in his concurring opinion:

> [A] State may permissibly determine that, at least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.

*Id.* at 515, *quoting Ginsberg v. New York*, 390 U.S. 629, 649-650 (1986).

The Court also specifically held that conduct which is disruptive may still be regulated:

> But conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts class work or involves substantial disorder or invasion of the rights of others, is, of course, not immunized by the constitutional guarantee of freedom of speech.

*Id.* at 513, *citing Blackwell v. Issaquena County Bd. of Ed.*, 363 F.2d 749 (5th Cir. 1966).

In the present case it is important to note that T.W. had no particular intent associated with the drawing other than to violate the policy. This severely hampers T.W.'s First Amendment claim, because he admits that he did not intend to convey any message by his conduct. This moves the drawing from conduct which is intended to project a message, and thus protected by the First Amendment, to pure conduct, which is not entitled to First Amendment protection.

Following *Tinker*, the Court further strengthened the right of school officials to enact policies which prohibit students' conduct even if it is considered speech. In *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), the Court upheld a policy which prohibited the use of obscene language in its schools. The Court reasoned that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." *Id.* at 683. The court further noted that a student's free speech right must be "balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Id.* at 681.

Two years after *Bethel*, the Court decided *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 258 (1988). The Court upheld a public high school's right to edit out inappropriate articles in a school-sponsored newspaper. In *Hazelwood*, the Supreme Court recognized that the:

> First Amendment rights of students in public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission even though the government could not censor similar speech outside the school.

Thus, under appropriate circumstances, schools are not only permitted, but owe a duty, to regulate the content of student speech. By affirming the District Court's determination that the Derby school district acted appropriately in this case and the policy did not violate the

Constitution, the Tenth Circuit followed rather than modified existing Supreme Court authority.

Further authority to justify the Tenth Circuit's opinion can be found in other federal court decisions. Using the *Tinker* standard, federal courts have specifically upheld a school's right to prohibit mere possession of the Confederate flag, regardless of the possessor's intent. In *Melton v. Young*, 465 F.2d 1332 (6th Cir. 1972), a public high school had experienced racial tension, much of which was centered around the Confederate flag, and the school adopted a policy which prohibited any image of the Confederate flag on school grounds. After being advised of the policy, Melton wore a jacket bearing the image of the Confederate flag on one sleeve. He was asked to remove the coat, and when he refused, he was suspended. The Fifth Circuit Court of Appeals reviewed the history of racial tension at the school and concluded that the school had every right to anticipate that a "tense racial situation continued to exist at Brainerd, and that repetition of the previous years' disorders might reoccur if student use of a Confederate symbol was permitted . . . " *Id.* at 1334.

The *Melton* Court reasoned that while the exercise of free speech was a fundamental constitutional right, equally important was the school's need to maintain decorum so that the learning process could be carried out in an orderly manner. *Id.* at 1334.

The *Melton* Court distinguished the facts from those in *Tinker*:

> Unlike the *Tinker* case, where the court found no evidence of either actual or potential disruptive

> conduct, but only an 'undifferentiated fear or apprehension of disturbance,' the record in the present case reflects quite clearly that there was substantial disorder at Brainerd High School throughout the 1969-70 school year, that this disorder most materially disrupted the functioning of the school, so much so that the school was in fact closed on two occasions, that much of the controversy the previous year had centered around the use of a Confederate flag as a school symbol and the school officials had every right to anticipate that a tense racial situation continued to exist as of the opening of school in September of 1970.

*Id.* at 1335.

A more recent case upholding the right of a public school system to prohibit clothing bearing the image of a Confederate flag is *Phillips v. Anderson Co. School District Five*, 987 F. Supp. 488 (D. S.C. 1997). During the five years preceding the incident which gave rise to that suit, Lakeside Middle School had experienced incidents of racial unrest, five of which related to students wearing articles of clothing bearing an image of the Confederate flag. The school had a policy which provided that "attire should not interfere with classroom instruction" and had a disciplinary policy for student interference with the instructional process or failure to obey school personnel. 987 F. Supp. at 490.

In January 1996, a student was suspended for wearing a jacket bearing an image of the Confederate flag to school. The student filed suit claiming that his suspension for failing to remove his jacket was a denial of his First

and Fourteenth Amendment rights. *Id.* at 492. The student claimed that prior racial tensions were insufficient for Lakeside school authorities reasonably to forecast that his wearing of a Confederate flag jacket would create a disruption of Lakeside's classes.

The Court responded by noting that:

> School authorities, however, are not required to wait until disorder or invasion of other students' rights occurs. If there are substantial facts which reasonably support a forecast of likely disruption, the judgment of the school authorities in denying permission and in exercising restraint will normally be sustained. Indeed, it has been held that the school authorities have a duty to *prevent* the occurrence of disturbances. *Curtailment of a student's exercise of the right of free speech does not demand a certainty that disruption will occur, but only the existence of facts which might reasonably lead school officials to forecast a substantial disruption.* (citations omitted; italics in original).

987 F. Supp. at 492.

The Court noted that the Confederate flag was a symbol which was "undisputedly offensive to at least some black students at the middle school." *Id.* at 493. The Court held that the constitutional right of a student to free speech may be "modified or curtailed by school regulations reasonably designed to adjust those rights to the needs of the school environment." *Id., quoting, Williams v. Spencer,* 622 F.2d 1200, 1205 (4th Cir. 1980) (*quoting, Quarterman v. Byrd,* 453 F.2d 54, 58 (4th Cir. 1971)).

In balancing the student's First Amendment rights with the school's interest in providing a safe educational environment for its students, the Court held:

> At Lakeside Middle School, [plaintiff's] right to wear the Confederate Flag must yield to the school's interest in affording his classmates an educational environment, conducive to learning, as much as possible, free from disruptions and distractions.

*Id.* at 493.

*Denno v. School Bd. Of Volusia County, Fla.*, 2000 WL 1005058 (11th Cir. 2000), is the latest case involving suspension of a student for display of the Confederate flag. A panel of the Eleventh Circuit upheld the district court's dismissal of a student's complaint regarding his suspension for display of the Confederate flag. The Eleventh Circuit considered a qualified immunity issue not presented in the *West* case. While factually distinguishable from the instant case, the holding in *Denno* once again supported the school district's right to reasonably limit a student's display of the Confederate flag.

The Tenth Circuit correctly applied the existing law to the facts of this case. The Derby school district clearly met the standard laid out in *Tinker* and the Tenth Circuit correctly upheld the district's right to regulate disruptive student behavior. As the Tenth Circuit's holding is consistent with existing law, certiorari is inappropriate.

## II. THE SCHOOL DISTRICT'S RACIAL HARASSMENT POLICY IS NOT OVERBROAD.

A statute must be substantially overbroad to be invalidated on its face. The mere fact that one can conceive of some impermissible applications of a policy is insufficient. Instead, there must be a realistic danger that the policy itself will significantly compromise recognized First Amendment protections of the parties not before the court. *Members of City Council v. Tax Payers for Vincent*, 466 U.S. 789, Syl. ¶¶2 and 3 (1984). Not just overbreadth, but substantial overbreadth, must be shown. *Id.* at 799-800. The overbreadth must be both real *and* substantial, especially where conduct, rather than pure speech, is involved:

> To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of the statute must not only be real, but substantial as well, *judged in relation to the statute's plainly legitimate sweep.*

*Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

It is important to note that each of the cases cited immediately above dealt with criminal statutes and/or statutes regulating the conduct of adults. The constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings. *Tinker, supra*, 478 U.S. at 683. The Supreme Court has also recognized that, given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, school disciplinary codes need not be as detailed as

criminal codes. *Bethel, supra,* at Syl. ¶ 7. Those who challenge policies adopted by public schools therefore have an even greater burden in attempting to demonstrate overbreadth.

Petitioners contend that the policy is overbroad because its terms ban all possession of the Confederate flag, yet there are a number of situations in which the Confederate flag is tolerated in the Derby school district. The Court found that the school district examines whether the symbol at issue has a legitimate educational purpose, and also looks at the intent of the student possessing the symbol, in weighing application of the policy. The District Court and the Tenth Circuit properly considered these limiting factors, and determined that the policy, as applied, is not overbroad. Indeed, it is not only proper, but mandatory, that the court consider these factors: "Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered.' (citations omitted)" *Ward v. Rock Against Racism,* 491 U.S. 781, 795 (1989). Since the school district had never disciplined a student for possessing depictions of the Confederate flag while involved in appropriate educational purposes, the school district's policy did not threaten protected speech and therefore is not unconstitutionally overbroad.

## III. THE LIMITING CONSTRUCTION DOES NOT MAKE THE SCHOOL DISTRICT'S RACIAL HARASSMENT POLICY VAGUE.

Petitioners argue that the limiting construction expressed by the Tenth Circuit exacerbates the policy's vagueness. Petitioners correctly state that, in order to prevail on a claim of facial unconstitutional vagueness, they must prove the policy is "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964). This is a very difficult standard for the petitioner to demonstrate. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the United States Supreme Court dealt with a challenge to an Oklahoma law prohibiting partisan political activity by certain state employees similar to the Hatch Act which applies to federal employees. The Court held that "[w]ords inevitably contain germs of uncertainty" but this did not render the statute unconstitutionally vague. 413 U.S. at 607.

In this case, petitioners argue that someone of reasonable intelligence would not be able to decipher what behavior or symbols constituted violations of the policy. The problem with this argument is that T.W. himself knew and understood what constituted a violation of the policy. T.W. admits that he knew what the Confederate flag was and that he knew drawing it was a violation of the policy. As the District Court concluded: "Such a state of mind is inconsistent with any claim that the policy did not give [T.W.] fair warning that his conduct was prohibited." *West v. Derby Unified School District No. 260*, 23 F.Supp.2d at 1235. The other three students sitting with T.W. completed written statements indicating they

warned T.W. not to draw the flag, or he would get in trouble. This is clear evidence that the Derby policy gives fair warning of what is prohibited.

The school district is charged generally with the education of students which includes the more specific responsibility of inculcating students with the values and civility they will need to function in society. Additionally, the school district has the responsibility to prevent disturbances and guarantee the rights of individual students to be secure and to be let alone. Policies to carry out this complex mandate and to prevent racial harassment and intimidation must by necessity have some flexibility. The school district's policy has such flexibility. Respondent asks the Court to reject the notion that persons of common intelligence must guess when they are racially harassing or intimidating another person, either through speech or by the bearing of certain symbols.

## IV. THE TENTH CIRCUIT FOLLOWED SUPREME COURT PRECEDENT IN ITS TREATMENT OF PETITIONERS' EQUAL PROTECTION COUNT.

Petitioner claims the Tenth Circuit's approval of the school district's policy which banned the possession and display of a Confederate flag was displayed "missed the mark" on petitioner's equal protection claim. (Petition, p. 13). It is the petitioners' treatment of equal protection principles that misses the mark. Petitioners argue that the Tenth Circuit decision violates T.W.'s equal protection rights by punishing students in possession of the Confederate flag in non-school related material. "The general [equal protection] rule is that legislation is presumed to

be valid and will be sustained if the classification drawn by statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 437 (1985). That is all the Equal Protection Clause mandates. In the instant case the classification drawn by the policy, possession of the Confederate flag for school related purposes versus possession for non-school related purposes, is rationally related to a legitimate state interest. As the Tenth Circuit held "[t]he school district's legitimate interest in this case is clear – to prevent potentially disruptive student conduct from interfering with the educational process." *West v. Derby Unified School District No. 260*, 206 F.3d 1358, 1365 (2000).

Petitioners go on to assert that the Tenth Circuit's aforementioned treatment of equal protection condones a rule that allows the government to control the message conveyed by the symbol, by controlling how the symbol appears on school grounds. This is incorrect. The school district has no intention of projecting a message regarding the Confederate flag. It is not trying to take sides on this issue as is evidenced by the policy, which enumerates prohibitions against Black Power symbols as well. However, the Confederate flag is unique in that it has a legitimate educational purpose as a historical symbol of the South and at the same time is a modern symbol of racial hatred. Therefore, when the Confederate flag is used for non-school related activities it has the potential to incite violence. Because the school district has a legitimate interest to avoid violence among students, display of the Confederate flag for non-school related activities can be constitutionally regulated.

Petitioners next argue that the government may not grant the use of a public forum for expression of ideas it finds favorable, but deny the public forum for expression of ideas of which it disapproves. Petitioners cite *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, (1972) in support of this proposition. However, petitioners' reliance on this authority is misplaced because that case involved a criminal statute prohibiting picketing. 408 U.S. at 93. Public schools, by contrast, are not public fora unless the school has, " 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public.' " *Hazelwood, infra*, 484 U.S. at 267. No evidence was presented in this case that the Derby School District created such a public forum in its schools.

The Tenth Circuit followed equal protection principles and correctly decided that T.W.'s equal protection claim failed. Consequently, certiorari should not be granted.

## V. THE TENTH CIRCUIT FOLLOWED ESTABLISHED DUE PROCESS PRINCIPLES.

Petitioners argue that T.W. did not receive due process because the investigation of the incident was not focused on determining whether he engaged in harassment or intended to do so. However, the assistant principal for the school district found, as did the district court, that T.W. disrupted class by intentionally violating the district's policy prohibiting the drawing of the Confederate flag. While the intent to harass is one factor which would justify suspension under the policy, T.W.'s intent to violate the policy also justified his suspension.

Prior to petitioner's short term suspension, he was afforded a hearing wherein the allegations made against him were explained to him and he was given the opportunity to respond. Pursuant to *Goss v. Lopez*, 419 U.S. 565 (1975) the Constitution requires that a student facing a short term suspension be entitled to oral or written notice of the charges against him and an explanation of the evidence against him. Additionally, a student should be afforded an opportunity to respond to the allegations. This is precisely the process afforded the petitioner. T.W. received notice of the allegation against him and an opportunity to be heard, after which he was suspended for knowingly and intentionally violating the school district's policy.

Petitioners next object to the description of the violation which will be present in T.W.'s school records – that he violated the school's Racial Harassment or Intimidation Policy. However, this does not affect T.W's property interest in his education. In order for this to be a valid argument, T.W. would have to establish some property interest implicated, other than the three-day suspension. T.W. would have to establish that the actual name of the violation implicates some property interest. He has not done so. T.W. is a minor, and his school disciplinary record cannot be used in any other proceeding which would adversely affect T.W.'s rights. Thus, there is no property interest implicated by the name of the violation, and no due process violation.

The Court should deny the petitioners' request for review on their due process argument.

## CONCLUSION

This case has less to do with T.W.'s First Amendment right to freedom of speech than with the appropriateness of his discipline for intentionally violating a school policy. In order to maintain schools free from violence and to ensure an optimum learning environment, school administrators must have the authority to take actions they deem necessary to maintain discipline in their schools. Without the ability to establish discipline and order, teachers will find it impossible to educate students. *See New Jersey v. T.L.O.*, 469 U.S. 325, 350 (1935) (Powell, J., concurring).

The Derby Unified School District No. 260 respectfully requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

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